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IN THE

New York (Stat.)

## SUPREME COURT,

OF THE

STATE OF NEW YORK.

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By ABRAHAM LANSING,

COUNSELOR-AT-LAW.

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CASES ADJUDGED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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EGBERT CARY, Respondent, v. JOHN P. WHITE and JANE  
WHITE, impleaded, &c., Appellants.

(GENERAL TERM, THIRD DEPARTMENT, JANUARY, 1873.)

If a mortgage given to secure an existing indebtedness extends the time for its payment, there is a new consideration, making the mortgagee a purchaser for value under the recording act.

Where the mortgagor secured his indebtedness by a mortgage which postponed the time of payment for six months, but was upon land already conveyed by the mortgagor, *Held*, the mortgagee having no knowledge or constructive notice of the deed, that he need not repudiate the mortgage for fraud and proceed on the original indebtedness, but might foreclose. The conveyance was made by the mortgagor through a third person to his wife, and she continued to occupy the property with him, and was so occupying at the time of the execution of the mortgage,—*Held*, that the mortgagee was not charged with notice of her title by reason of possession.

THE action was brought for the foreclosure of a mortgage made by John White, deceased, to the plaintiff to secure the payment of \$1,000 six months after date, and bearing date November 24, 1868.

The mortgage was recorded on the same day in the clerk's office of Cortland county, in which county the mortgaged

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Cary v. White.

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premises were situated. The action was tried at the Cortland County Circuit in December, 1870, without a jury. It appeared that on the 21st of October, 1866, the mortgagor was the owner of the premises described in the complaint, and on that day executed a deed of the same to his son, John P. White, without any consideration. That on the same day John P. White conveyed to Jane White, his mother. The mortgagor, in 1861, had received \$700 of his wife, being her separate property. The deed was executed in part payment of this sum and partly as a gift, the mortgagor not being indebted at the time, except as aforesaid and in a debt of \$1,500 due his son. These deeds were not recorded, but delivered to the grantee and kept by her until March, 1868, when her husband, without her consent, destroyed them.

John White entered into the produce business with Cary, Medcalfe & Co., of which firm plaintiff was a member, and, being indebted to them, without the knowledge, approbation or consent of his wife, executed the mortgage in question for and in behalf of the firm. The plaintiff had no knowledge or notice of the unrecorded deeds. The judge, among other things, found in favor of the plaintiff, and that the plaintiff having taken a bond for \$1,000 of the indebtedness of John White to the firm of Cary, Medcalfe & Co., payable six months after date, for and in behalf of the firm, of which he was a member, and this mortgage to secure it, and the firm having approved and adopted the transaction, their immediate right to sue and enforce collection of the indebtedness was suspended for six months; that they, by the transaction, surrendered that right which constituted the plaintiff a mortgagee in good faith for a valuable consideration; that the plaintiff being such, and having procured his mortgage to be recorded in the county where the land is situated, without knowledge or notice of the existence of the unrecorded deed to the defendant Jane, his mortgage was entitled to preference over said deed under the recording act, and he was entitled to the usual judgment of foreclosure and sale of the premises described in the complaint, with costs and disburse-



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Cary v. White.

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ments to be taxed by the clerk of Cortland county, to be paid out of the avails of the sale.

A judgment was entered, and defendants, as administratrix and administrator of John White, deceased, appealed.

*Duell & Foster*, for the plaintiff and respondent.

*A. P. Smith*, for the defendant and appellant.

Present—MILLER, P. J., P. POTTER and PARKER, JJ.

By the Court—MILLER, P. J. The plaintiff in this action took the mortgage in question in his own name for a debt due the firm of which he was a member, without knowledge of the existence of the conveyances, one of which was made by the mortgagor to his son, and the other by said son to the wife of the mortgagor, the defendant, Jane White; said conveyance never having been recorded, but destroyed by the mortgagor prior to the execution of the mortgage. The bond was payable six months after date, and the firm approved and adopted the security. The question to be determined is, whether the plaintiff was a mortgagee in good faith and for a valuable consideration, as against the unrecorded conveyances, one of which was made by the mortgagor to his son, and the other by the son to the defendant, Jane White. The recording act requires conveyances to be recorded, and when not recorded they are void as against a subsequent purchaser in good faith for a valuable consideration. (1 R. S., 756, § 1.) A mortgagee stands in the same position as a purchaser, within the statute cited. But to constitute a purchaser within the meaning of the act, the party must not only have received the conveyance without notice of the prior unrecorded deed, but he must have received it upon some new consideration or must have surrendered some security or important right. (*Webster v. Van Steenberg*, 46 Barb., 211; *Lawrence v. Clark*, 36 N. Y., 128.) The surrender of a precedent debt is not enough. In the case at bar the debt was due and the

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Cary v. White.

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time for its payment was extended for the period of six months by the terms of the bond. If this was a valid suspension of the power to collect the debt for the time named, then, according to the authorities, it was a sufficient, a new and present consideration, and constitutes the plaintiff a purchaser in good faith. (*Putnam v. Lewis*, 8 J. R., 389; *Pratt v. Coman*, 37 N. Y., 440; 5 Trans. App., 334; *Burns v. Rowland*, 40 Barb., 369; *Traders' Bank v. Bradner*, 43 id., 379.) These authorities are directly in point, and, I think, decisive.

The firm of which the plaintiff was a member parted with the right to collect the debt immediately, and this was enough to bring the plaintiff within the principle of the cases cited.

It is claimed that there is a distinction between the present case and those cited, which is supposed to be this: That inasmuch as the mortgagor had conveyed away the premises before the execution of the mortgage, he was guilty of a fraud which entitled the creditors whom the plaintiff represented to bring an action upon the original indebtedness without regard to the mortgage.

The mortgage was valid upon its face, and I think it can scarcely be claimed upon any legal ground that the plaintiff was bound to pursue the uncertain and doubtful remedy of establishing a fraud by enforcing the collection of the original debt. The plaintiff had no notice of the conveyances at the time or any knowledge of them, according to the evidence. How, then, could he proceed to the collection of the debt immediately without any knowledge of the fraud? The plaintiff was lulled into silence by the security of the mortgage, and thereby prevented from enforcing the collection of his demand when perhaps the mortgagor was entirely solvent and able to pay, and it cannot well be claimed that after he had thus been delayed and the mortgage had become due he must be compelled to sue on the original consideration, claiming that the mortgage was fraudulent. The mortgagor at any rate would have been estopped from alleging any such fraud, and certainly the plaintiff was not bound to avail himself of

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Cary v. White.

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it when he had no knowledge on the subject. The plaintiff, then, was not to blame for relying upon his mortgage, and as the defendant Jane White is in fault for not having the deeds recorded, which would have put the plaintiff on his guard, she should suffer the consequences of her own neglect.

It may, perhaps, be questionable whether any fraud is shown in the execution of the mortgage, as that question was not a direct issue upon the trial, and hence does not directly arise.

As there was a new and present consideration in extending the time for the payment of the debt, it is not necessary to examine the cases cited by the defendant's counsel to the effect that where the mortgage is given to secure the payment of a precedent debt and no security is surrendered, the mortgagee is not a *bona fide* purchaser or encumbrancer for value.

I think that the judge committed no error in finding that the act of plaintiff in taking the bond and mortgage in his own name was approved by the firm. Nor was there any such possession of the defendant, Jane White, the wife of the mortgagor, as to constitute notice to subsequent purchasers of the title under which she now claims. The husband had been in possession long before he conveyed to his son and the wife acquired title, and the occupation continued the same after the conveyance. As the deeds were not recorded, the wife's remaining in possession was not notice to the plaintiff.

The decision of the court at the circuit was right, and the judgment must be affirmed with costs.

Judgment affirmed.

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Rexford v. Rexford.

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MARY M. REXFORD, Appellant, v. CYRUS W. REXFORD,  
Respondent.

(GENERAL TERM, THIRD DEPARTMENT, JANUARY, 1872.)

In order to authorize a court to declare a wife's conveyance invalid on the ground that its execution was procured by duress of her husband, the evidence of duress should be strong and clear.

If declarations made by the husband to the wife are relied upon to prove such duress, they should be of such a character as to establish, beyond any question, that she acted under an apprehension of personal injury or grievous wrong.

*Held*, accordingly, that threats made by a husband to his wife some time prior to her signing a deed by which her inchoate right of dower was conveyed to a third person, that if she did not sign the deed she should not live with him in peace, were not sufficient to invalidate her deed.

There is, it seems, no superior equity in favor of a grantor, whose deed is voidable for duress, against the purchaser for value, without notice.

A legal title of one who takes without notice of a prior equity, must, it seems, prevail over such equity.

Where a wife is introduced to the officer taking her acknowledgment to a deed by her husband, in the presence of his brother, both known to the officer, there is sufficient ground for his certificate of knowledge of the grantor; though if mistaken, the deed would be avoided.

Where the wife making an acknowledgment made no reply to the questions put by the officer as to the execution of the deed by her freely, &c.,—*Held*, that her assent might be implied from her silence.

THIS action was brought to set aside a deed, so far as it concerned the plaintiff, executed by herself and her husband to the defendant on the 21st day of December, 1864, of certain lands in Saratoga county, on the ground that she executed it under the influence of the threats of her husband, who died in December, 1867. The judge, before whom the trial was had, found as a fact that plaintiff's husband, before the deed was executed, requested her father to persuade her, to execute the deed, and directed him to state to her that if she did not sign the deed she would never have any peace with him as long as she lived, and that her father so stated to her as directed. The judge further found that the plaintiff at

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Rexford v. Rexford.

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first refused to sign the deed, but finally under such threats and influenced thereby did execute it. The judge also found that the execution of the deed was duly acknowledged according to law by the plaintiff and her husband; was delivered to the defendant as a valid conveyance and accepted by him for a good and valuable consideration; and that the defendant paid such consideration, relying upon the validity of the conveyance and upon the acknowledgment and certificate. As conclusions of law the judge decided and adjudged that the deed was valid, and that the plaintiff thereby duly released her inchoate right of dower in the premises, and is not entitled to dower therein; and that the complaint in the action be dismissed with costs. Judgment was entered on the decision, and the plaintiff appealed.

*D. C. Beattie*, for the appellant.

*S. W. Jackson*, for the respondent.

Present—MILLER, P. J., P. POTTER and PARKER, JJ.

By the Court—MILLER, P. J. Where parties occupy the relation of husband and wife, there should be strong evidence that the execution of a deed by the latter was procured by duress of the husband, to authorize a court to declare it invalid on that account. If declarations made by the husband to the wife are allowed to interfere with her solemn act and deed, they should be of such a character as to establish beyond any question that she acted under an apprehension of personal injury or some grievous wrong. If any other rule prevailed, there would be great hazard to purchasers in taking title under conveyances duly executed and acknowledged.

Mere threats of the character proved to have been made by the husband to the wife, who is the plaintiff in this case, for the purpose of inducing her to execute the conveyance to the defendant, cannot, I think, be regarded upon any legal principle as establishing such duress as vitiates the instrument.

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Rexford v. Rexford.

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At most, they were but strong means employed to influence the plaintiff, which unfortunately too frequently attend the conjugal relation, and are much to be condemned; but which do not constitute that legal duress which justifies the wife in repudiating her contract, and which exonerates her from the consequences of a deliberate act, which otherwise is lawful. The threats communicated to the plaintiff, and under the influence of which, it is claimed, the deed was executed, were to the effect that if she did not sign the deed she should not live with her husband in peace.

This was not enough to constitute legal proof of threats, which might reasonably and fairly create an apprehension of some grievous wrong or great bodily injury, or unlawful imprisonment. (1 Penn., 320.) They related to the domestic peace and happiness of the plaintiff, and nothing more, and the deed was executed some time after she had knowledge of her husband's views and wishes, and after ample opportunity had been furnished to reflect upon the subject.

The case cited from 26 N. Y., 9 (*Eddie v. Slimmon*), has no application. The threats there were not by the husband, but by a third party against the husband. He was charged with a high crime, and disgrace, conviction and imprisonment for a felony were threatened, which would inevitably ruin both the husband and the wife. After much excitement, terror and alarm, and a long discussion, and under apprehensions for the safety of the husband, the wife yielded to the pressure of the party in whose favor the instrument in question was executed. There are no such elements in the case under consideration, and the deed was not invalid as against the plaintiff for any such reason.

I also think that the acknowledgment of the deed was sufficient. The plaintiff was introduced to the officer as the wife of the grantor, and in the presence of his brother. Both the husband and his brother were acquainted with the officer. Knowledge of a person must depend, to a great extent, upon an acquaintance thus formed; and although such a casual introduction does not give such knowledge as is acquired by

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Rexford v. Rexford.

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frequently meeting a party, yet it furnishes some information from which knowledge may be derived, and hence the officer may properly certify that he knows the party as required by law. If he makes a mistake, the deed of course could be avoided; but if he is right, no one is injured. This question is decided in *Wood v. Bach* (54 Barb., 134), which is directly in point and conclusive.

The acknowledgment of the plaintiff before the officer was also sufficient; and the certificate of acknowledgment is conclusive, unless proved to be untrue. The plaintiff testifies that she made no reply to the question put to her by the judge when her husband was absent. Assuming this to be true, having signed the deed and expressed no dissent, her silence must be considered as an assent. As she had signed the conveyance, if she intended to repudiate her own act before the officer, it was her duty to speak and openly express her dissent. Actions often speak louder than words; and an individual who goes before an officer for the purpose of performing an act of this kind and manifests no objection, thereby furnishes tokens of assent, and conveys, in unmistakable language, the idea of acquiescence. In the present case it is apparent that the officer was thus induced to certify to her assent, and the plaintiff is now estopped from claiming that the act was invalid. If a different rule was allowed to prevail, officers authorized to take acknowledgments might easily be misled and deceived by an apparent acquiescence of the party, and title to real estate might be jeopardized and put in great peril.

If it be conceded that the testimony is conflicting upon the question whether the defendant actually purchased the farm and paid the consideration money expressed in the deed, there is not, I think, such a preponderance of evidence in favor of the defendant as to authorize this court to reverse the judgment upon this question of fact.

The statement of the defendant is positive and direct on this subject; and although there are some circumstances calculated to awaken suspicion, yet I am inclined to think they are not

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Rexford v. Rexford.

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strong enough to set aside entirely the defendant's positive evidence. The judge on the trial did not feel at liberty to hold that the defendant was not entitled to credit and had sworn falsely. As he heard and saw the witness testify, he had greater opportunities and was better qualified to judge than any appellate tribunal, and the conclusion at which he arrived should not be disturbed, except for the strongest and most satisfactory reasons.

It should be a very clear case which would justify this court in holding, under the circumstances, that the defendant was not entitled to credit, and that the judge upon the trial committed an error in believing his testimony. No such case is presented to us, and it is quite manifest that the finding of the judge upon this question should be sustained.

As the defendant was a purchaser for value of the premises in controversy, and the deed at most was not absolutely void for the alleged duress, I am inclined to think that the plaintiff has no right or equity as against the defendant.

The rule in equity is, that as between two parties having equal equities the prior equity must prevail. But if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail. (*Newton v. McLean*, 41 Barb., 285.)

The offer made by the plaintiff to prove the declarations of the husband to the wife before the execution of the deed, was not competent evidence. They was not a part of the *res gestæ*, but hearsay, and therefore inadmissible.

There was no error upon the trial, and the judgment must be affirmed with costs.

Judgment affirmed.



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Haight v. New York Central Railroad Co.

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THERESA HAIGHT, Respondent, v. THE NEW YORK CENTRAL  
RAILROAD COMPANY, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, JANUARY, 1872.)

The omission to look both up and down a railroad track before attempting to cross it, is such negligence as prevents a recovery against the railroad company in case of accident.

It is no excuse if the precaution is neglected until too late to avoid an approaching train.

APPEAL from judgment and order denying a new trial.

This was an action brought by the plaintiff to recover damages for injury alleged to have been caused by the negligence of the defendant. The cause was tried at the Montgomery County Circuit, in February, 1871, where a verdict was rendered in favor of the plaintiff for \$2,500. A motion was made for a new trial on the minutes, which was denied. A bill of exceptions was made by the defendant and a judgment entered for the plaintiff on the verdict. The defendant appealed from the judgment and order denying a new trial. The facts are sufficiently stated in the opinion.

*S. W. Jackson*, for the appellant and defendant.

*M. L. Stover*, for the respondent and plaintiff.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. The only question which I think it is important to examine in the present case arises upon the exception taken by the defendant's counsel to the decision of the judge upon the trial denying the motion for a nonsuit. This motion was made upon the following ground, among others: That it appears by undisputed evidence that the negligence of the plaintiff contributed to cause the accident which resulted in the injuries complained of. The testimony in relation to this is not essentially conflicting, and for the purposes of the motion the plaintiff's version of the

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Haight v. New York Central Railroad Co.

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facts must be assumed to be true. It was proved that on the 4th day of October, 1866, about 6.20 p. m., that the plaintiff passed from her grandmother's house, on the south side and near the tracks of the defendant's railroad, in the village of Amsterdam, along the railroad easterly, until she reached the crosswalk on the easterly side of Bridge street, which crossed said tracks at right angles. There were three tracks, two of which, northerly, were main tracks, running through, and the other, the southerly, a switch or branch track. Ten empty freight cars were standing at the time on the branch or side track, four or five feet from the west side of the plank crossing, and a train of freight cars was moving westerly on the most northerly track, the last of which cars was leaving the crosswalk as the plaintiff advanced to cross. She proceeded and crossed the branch track, which was seven feet from the first main track. When she left the branch track she stepped upon the first main track and was struck down by the engine of the train, which was then proceeding on its regular time, with the head light of the engine lighted. The plaintiff testified on her direct examination that when she came to the crosswalk she looked to see if a train was coming, and could not see all the way up, and only about the length of a car when she turned her head to look; that if the freight cars had not been there she could have seen all the way up the track; that when she turned her head to look, she was going over the first track toward the track upon which she was struck; that she turned to look up and could not see; that she turned to look where the last freight car going west went and was struck. Upon her cross-examination she stated that when she looked to see if a train was coming, she was going across the branch track and just about to step off the branch track; that this was the last time she looked, and then proceeded on until she was struck. The testimony shows that a person standing on the east side of Bridge street, over the north rail of the branch track, with cars on the branch, could see some distance and for several hundred feet a train approaching from the

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Haight v. New York Central Railroad Co.

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west. The freight cars, which it is alleged were in the way, were on a track adjoining the one upon which the plaintiff was struck, and could not interrupt the view, as they would not be in the direct line of the plaintiff's vision. It is, therefore, quite plain that if the plaintiff had looked in the right direction as she was about leaving the branch or side track, she must have seen the approaching train. There was no obstruction in the way, and that she did not see or hear the train, which was coming when she stepped on the track, was owing to the fact that she did not look for it in the direction from whence it came. It seems to me that the plaintiff was guilty of negligence in thus failing to use her faculties to protect herself from injury, and that no lawful excuse is furnished for her inattention and neglect to look in the right direction. It was suggested by the judge in his charge to the jury upon the trial that if the plaintiff looked and saw no train and the train was approaching so rapidly, as to overcome the line of track in view, from 400 to 600 feet, while she turned her head from west to east, then, she probably would have been held to have exercised due precaution.

It appears to me that the answer to this remark is that she should have turned her head and looked both ways to see if a train was coming before going on the track, and it is no excuse to say that she neglected to look both ways until she had only time to look in one direction. The danger was from the direction from whence this train was expected, it being about its usual time for passing, and it would have been quite easy to have made a particular observation in that direction. It may also be observed that it is hardly possible that a train could have proceeded the distance of several hundred feet, in a single instant, and before the plaintiff could turn her head to look in an opposite direction. The authorities are numerous that it is negligence for a person to attempt to cross a railroad track without looking in both directions to see if a train is approaching. (*Ernst v. H. R. R. Co.*, 24 How., 110; *Wilds v. The Same*, 29 N. Y., 327; *Wilcox v. Rome and W. R. R. Co.*, 39 id., 358; *Gonzales v. N. Y. & H. R.*

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Smith v. City of Albany.

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*R. Co.*, 38 id., 442; *Beisiegel v. N. Y. C. R. R. Co.*, 40 id., 22; *Grippen v. N. Y. C. R. R. Co.*, id., 51.)

The time was near at hand for the passing of this train, and the plaintiff might have seen it if she had looked before going on the track. This would have been in season to have averted the disaster; and as she failed to take this necessary precaution, but one conclusion can be drawn, and that is, that negligence is established. (*Grippen v. N. Y. C. R. R. Co.*, 40 N. Y., 47.) That the plaintiff neither saw nor heard the train is inexplicable.

There is no similarity between the present case and one where a person is driving a team and stops to look and listen, and hearing no signal of an approaching train proceeds and continues looking to the right and left all the while, and while so engaged finds a train upon him. (*Renwick v. N. Y. C. R. R. Co.*, 36 N. Y., 132.) The plaintiff here failed to exercise the degree of vigilance which was employed in the case last cited, and thus made herself liable to the charge of negligence.

The judge was wrong in refusing to nonsuit the plaintiff for the reasons stated, and the order and judgment must be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

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ADAM W. SMITH, Appellant, v. THE CITY OF ALBANY,  
Respondent.

(GENERAL TERM, THIRD DEPARTMENT, JANUARY, 1872.)

The rule is well settled that no recovery can be had upon a contract entered into in contravention of the terms and policy of a statute.

Accordingly the statute (Sess. Laws 1843, chap. 57, §§ 1, 2, 3), enacting that "it shall not be lawful for a member of the common council of any city in this State \* \* \* to become a contractor under any contract authorized by the common council, &c., \* \* \* of which he is a member, or be in any manner interested directly or indirectly, either as principal or surety, in such contract," and providing that "contracts in violation of the above provisions may be declared void at the instance of the city \* \* \* or of any other party interested in such contract."

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Smith v. City of Albany.

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*Held*, that plaintiff, a livery-stable keeper, could not recover from the defendant for carriages, &c., furnished by him while an alderman of the city, upon the order of a committee appointed by the common council to make arrangements for the celebration of the Fourth of July. The defendants might either bring an action to have the contract declared void, or set up its invalidity in an action brought to recover upon it.

THIS is an appeal from a judgment rendered in favor of the defendant on the report of a referee.

On the 7th of June, 1869, the common council of the defendant passed a resolution appointing a committee of five to make the necessary arrangements for celebrating the Fourth of July, and on the 24th of June appropriated \$2,500 to pay the expenses.

One member of the committee failed to attend and take part in its proceedings, although all were notified of its meetings.

The plaintiff kept a livery stable, and, at the request of the committee, furnished the horses and carriages used in celebrating the Fourth of July, and in making the necessary arrangements for the celebration, and their hire was reasonably worth the sum of \$139.

The carriages were ordered, supplied and used before the \$2,500 appropriated had been expended; but the defendant's chamberlain had paid out the amount of \$2,500 for expenses incurred in the celebration before the plaintiff's bill was presented.

The defendant has all the powers conferred under the Dongan charter and the act of April 12, 1842.

The plaintiff was, at the time, an alderman and a member of the common council of the defendant, and upon that ground judgment was given for the defendant.

Demand of payment was made of the chamberlain before suit brought. The referee reported in favor of the defendant. Exceptions were duly made to the report. Judgment was entered on the referee's report and the plaintiff appealed.

*Amasa J. Parker*, for appellant.

*N. C. Moak*, for respondent.

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Smith v. City of Albany.

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Present—MILLER, P. J., P. POTTER and PARKER, JJ.

By the Court—MILLER, P. J. Assuming that the common council had power to make an appropriation for the purpose of celebrating the anniversary of our national independence, which I am inclined to think was authorized by the charter of the city of Albany, the question to be determined is whether the claim of the plaintiff was in violation of the statute which provides that "*it shall not be lawful* for a member of the common council of any city in this State" \* \* \* "to become a contractor under any contract authorized by the common council," &c., \* \* \* "of which he is a member, or be in any manner interested directly or indirectly, either as principal or surety, in such contract." (Sess. Laws of 1843, chap. 57, p. 36, § 1; 3 R. S., 303.) The third section of the same act provides that "contracts in violation of the first and second sections of this act may be declared void at the instance of the city," &c., \* \* \* "or of any other party interested in such contract except the officers mentioned and prohibited," &c. The first section cited is broad and comprehensive in its terms, and as it expressly *prohibits* any contract by any member of the common council, I am at a loss to see how this action can be maintained. It is not restricted to any class of contracts, such as grading streets or the erection of public buildings; but, upon a fair interpretation, includes all contracts which may be made, and which may have any relation to the corporation of which the contractor is an officer. While, perhaps, it may not be unlawful for an officer named in the statute to perform labor by the day under a contractor, or even to furnish his teams for that purpose, yet when the officer undertakes to perform a contract or furnish the means or materials for such purpose, he comes within the meaning of the statute, and the evil intended to be remedied which was to prevent officers from obtaining pay for services rendered beyond their actual value, and thereby to be influenced in their official action. The rule is well settled that no recovery can be had upon a con-

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tract entered into in contravention of the terms and policy of a statute, and the parties cannot invoke the aid of the courts to enforce an unlawful agreement. (See *Bell v. Quin*, 2 Sandf., 146; *Cowen v. The Village of West Troy*, 33 Barb., 48; *Donovan v. The Mayor*, 33 N. Y., 294.) The law prohibiting public officials from being contractors or participating in contracts connected with the municipality or body which they represent is founded upon grounds of public policy and sound morals, and was designed to preserve purity, integrity and economy in the administration of public affairs. Persons who occupy positions of public trust should, so far as practicable, be removed from all suspicion of encouraging wasteful and unnecessary expenditures, and it is not to be supposed that such will always be the case where a party has an interest in a contract made with a public body.

It is insisted that if the statute was violated, the third section provides that it may be declared void "at the instance of the city," and that this can only be done by an action brought for that specific purpose.

The rule invoked by the plaintiff's counsel is, that where a new offence is created by a statute and a penalty is given for it, or a new right is given, or specific relief is given for the violation of such right, the punishment and remedy is confined to that given by statute. (Sedg. on Stat. Construc., 94, and authorities cited.) The cases which are cited to sustain the position taken are actions brought for affirmative relief, which was not provided for by the statutes, under which the right was claimed. In *Smith v. Lockwood* (13 Barb., 209), the action was brought for an injunction to restrain the manufacture of saws in the State prison at Sing Sing within statutory limits, and it was held that an infraction of the statute was a wrong to the public, for which the people in their collective capacity alone are entitled to redress, unless the parties aggrieved have sustained special damages peculiar to themselves, and not in common with others. This was in accordance with the general principle that where a new right or means of acquiring it is conferred

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and the adequate remedy for its invasion was given by the same statute, parties injured are confined to the statutory redress. In *Dudley v. Mahew* (3 Comst., 9), it was decided that the courts of this State have no jurisdiction to entertain a suit instituted to restrain the infringement of a patent right; that the right of the inventor was statutory, and the statute providing an adequate remedy for protecting it, the proprietor of the right was confined to that remedy. *Calkins v. Baldwin* (4 Wend., 667) was an action for flowing the lands of the defendant by means of a dam on the Seneca river, and it was held that as the dam was erected by virtue of the act of the legislature for the improvement of the navigation of the river, which act provided for compensation for damages, the party injured must seek his remedy in the mode pointed out by statute, and could not bring an action of law.

In the cases cited the parties sought relief which was otherwise provided for, and in none of them did the question arise whether an express prohibition of law against a particular act precluded a recovery. The statute in question says "it shall not be lawful," &c., thus prohibiting the act; and can it be claimed that an unlawful contract, made in violation of the statute, can be enforced in an action at law because no action is brought to set it aside? A defence asking for affirmative relief by canceling the contract, I think, would clearly be available; and while the rule referred to precludes a recovery by an injured party, except it be in accordance with the statute, it does not interfere with or apply to a defence interposed to an action brought to enforce a contract which is prohibited by law.

In *Foster v. Taylor* (5 Barn. & Adolph., 887), it was held that where a statute prohibited the sale of butter not marked, and provided a penalty for so doing, that a buyer might set up a violation of the statute as a defence to an action for the purchase-price.

LITTLEDALE, J., after quoting from Lord MANSFIELD, "that where new-created offences are only prohibited by the general prohibitory clause of an act of parliament an indict-



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ment will lie, but where there is a prohibitory particular clause specifying particular remedies, then such particular remedy must be pursued, for otherwise the defendant would be liable to a double prosecution, one upon the general prohibition, and the other upon the particular specific remedy," proceeds to say: "The same limited rule, however, does not seem to have been adopted in civil actions, so as to confine the proceedings against the party offending to the penalty," &c. This case is directly in point.

As the contract was unlawful and void, the defendant had the right either to bring an action to have it so declared or to set up its invalidity in an action brought to recover by virtue of it.

There are no other questions in the case which require discussion, and although the services were actually rendered and there is nothing to show that the plaintiff has made any other than a just claim, yet under the defence interposed he cannot recover.

The judgment must, therefore, be affirmed with costs.

Judgment affirmed.

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JOHN E. PERKINS, Respondent, v. CHRISTINA PERKINS,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1872.)

Under the existing statutes of this State an action at law cannot be maintained against a married woman by her husband upon a contract to pay him for services rendered to her by him personally. (MILLER, P. J., *contra*.)

The acts conferring additional privileges upon married women, were passed solely to enfranchise married women and to protect their property, and were not intended to confer any additional rights or privileges upon the husband. (P. POTTER, J.)

The nature of the marital relation requires that a contract claimed to have been made between husband and wife to pay for services rendered, should be carefully scrutinized with a view to ascertaining whether the services were not performed voluntarily and as a part of their respective

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duties to each other, and where the agreement to compensate for services rendered cannot be conclusively shown, or clearly inferred from the facts, no recovery should be allowed. (Per MILLER, P. J.)

APPEAL from a judgment rendered by the County Court of Columbia county, affirming a judgment rendered by a Justice's Court.

The plaintiff, the husband of the defendant, sued to recover for work, labor and services which he claimed to have rendered personally for her, at her request.

It appeared that the plaintiff and defendant were living separately, and that in February, 1859, the defendant had gone to the plaintiff, where he was at work, and induced him to employ himself at a hotel which the defendant owned and kept, in taking general charge of it and of the premises. There was no express agreement as to, payment for, or the value of the plaintiff's services, but by the plaintiff's testimony the understanding was that plaintiff and defendant should keep the hotel for a year, and if they could not succeed, would sell it. The defendant's testimony was substantially to the same purport.

The plaintiff and defendant then lived at the hotel; the former took charge of the bar and premises, cultivated the latter, and gave his attention and services to the business of the establishment in general, and he remained there for some three months, when he left for five weeks, and returned again at the end of the latter period for two weeks, when he was dismissed by the defendant, who rented the place to one Gallagher, her brother-in-law, and thereafter plaintiff and defendant again lived separately.

The defendant conceded the efficiency of the plaintiff's services during three weeks immediately following his taking up his abode at the hotel, but claimed that since that time they had been worthless, on account of plaintiff's intemperance.

*S. L. Magoun*, for the appellant.

*R. E. Andrews*, for the respondent.

Present—MILLER, P. J., P. POTTER and BALCOM, JJ.

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P. POTTER, J. This is an action of law brought by a husband against his wife to recover, in an action of assumpsit, for services claimed to have been performed for the wife.

At common law the husband and wife by marriage became one person. The very being or legal existence of the woman was, by the common law, suspended during the marriage, or at least was incorporated and consolidated into that of the husband, under whose wing and protection she performed every act. (1 Black. Com., 442; Littleton, §§ 168, 291; Bright on Husband and Wife, 2.) It was in consequence of this unity of person between them that neither the husband nor wife could make a grant or contract, the one with the other, (*Shepard v. Shepard*, 7 John. Ch., 60; *Voorhees and Wife v. Presbyterian Church*, 17 Barb., 104, 105; *White v. Wager*, 25 N. Y., 329; per DENTON, J., *McQueen on Husband and Wife*, 18.) By these and numerous other authorities the husband and wife are one person. In this condition of unity a husband and wife could no more contract with each other than one individual could contract with himself; the act would be a nullity.

Modern statutes in this country, however, have wrought some changes in this relationship. The incapacity of a wife to make contracts has, to some extent, been removed by these statutes. Except to the extent that this incapacity has been removed by statute, the marriage relation, in its oneness of unity, remains unchanged, as it was at common law before those statutes were enacted. The new powers conferred on married women by these statutes were in derogation of common law, and are to be strictly construed. (Coke's Inst., 97, b; *Graham v. Van Wyck*, 14 Barb., 531, 532; 4 Sandf., 236.) These modern statutes relate only to the control and management by married women of their sole and separate estate. As to that, the wife is to be deemed a *feme sole*. The husband has had no new powers conferred upon him, nor has he been released from any of the duties and obligations imposed upon him. His condition in this marriage relation is unchanged, so far as regards its unity. The wife is released

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from no part of this unity, except in so far as it is expressed in these statutes.

In *White v. Wager* (25 N. Y., 333), DENIO, J., speaking of these statutes, says: "No doubt there was an intention to confer on the wife the legal capacity of a *feme sole* in respect to the conveyance of her property, but this does not prove that she can convey to her husband." Then he proceeds to show that as *femes sole* have no husbands, the implication is against the power to convey to a husband.

These statutes, being in derogation of the common law, are to be construed with reference to the common law as it existed when they were passed. DWARRIS says: It is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The *law* rather infers that the act *did not* intend to make any alteration, other than what is specified and *besides* what has been pronounced; for if they had that design, they would naturally have expressed it. And Chancellor KENT says: This has been the language of courts in every age, repeating the language of DWARRIS, "That it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires." (1 Cow., 464.) The instances are repeated in our books of reports holding this construction to be sound. It would be contrary to the public policy of the law that there should be a divorce from that original union and mutual confidence demanded by the marital relation. There has been no expression, either in the titles or enacting clauses of the statutes for the protection of married women or their property and estates, in their letter or spirit, of an intent to destroy the unity or identity of husband and wife, or which demands or authorizes any such construction as that they may sue or be sued at law, by each other. It would be monstrous, it would open a door to intolerable controversy and litigation, and sow the seeds of perpetual domestic discord and broil. (*Longendyke v. Longendyke*, 44 Barb., 369.) It would convert the holy institution and honored relation of marriage into a nursery to culti-

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vate the worst passions and infirmities of humanity. Surely no such downward progress was intended by the legislature in this day of advancement in civilization, of our natural progress in knowledge and intelligence, and of our advanced social and political condition. The spirit and intent of all the statutes enacted to protect married women in their estates, and to give them *in that particular* the powers of *femes sole*, are limited in their construction to the exercise of that power. Though very full powers in that regard are conferred, as they should be, in order to their proper enjoyment; yet all these statutes being *in pari materia*, are to be construed together as one in their letter, spirit and intent, precisely as if they were all contained in one act.

The statutes of 1848 and 1849, on their face and in their letter, recognize the disqualification of husbands and wives to contract with each other, in the right to take and receive estates from any person other than the husband. Why except him, but to prevent the construction that the common law was intended to be abrogated? These statutes are the beginning, and they continue to be a part of a new system and policy, in relation to the separate estates of married women. What part of the common law then is abrogated, except that which the statutes express? Has any jurist, has any lawyer supposed that a husband is not *now* bound to support, provide for and maintain his wife? That from the obligations and duties which the marriage contract imposes, he has been discharged by these new statutes? That his power to command and her duty to obey all reasonable commands has been severed and abrogated? Do they confer upon her the option to say he shall not enjoy his marital rights and to select her own chosen substitute to exercise them? Do they, in fact, amount to a practical divorce? Better far for the permanence of the blessings of the marriage relation; better far for the peace of society, the union and tranquillity of family relations that the divorce should be *total*, at the option of the parties, than that there should be a *partial* one created by an undefined *line* to be guessed at by loose interpretation, thus leav-

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ing domestic bickerings to affect, if not overwhelm, the courts, and allowing the parties to a marriage contract to sue each other for every fireside controversy.

Did any one ever suppose that the possession of some separate estate by the wife released the husband in any degree from the common-law liability and duty to support and maintain his wife? If he refuses or neglects to furnish such support, may not the tradesman or mechanic sue the husband for necessities furnished for her support? Would it be a good defence to an action for such legal liability for the husband to plead that the wife had a separate estate? Is the common law changed in this respect, because the husband abandons or lives separate from her? If the tradesman sues for necessities furnished to the support of the wife, is the common law changed that requires him to prove that the husband has omitted to furnish them? Could the tradesman sue the wife upon such an account, because the husband refused to pay it? If the husband sues for such necessities furnished, whom would he sue? What law has given him a better right than a stranger? Must he not sue the same person, sue himself and prove his own omission to furnish the necessities? Why can he not do this? because of that legal unity which no statute has dissolved. If he may sue her for his services, as a legal right in a court of law, why may he not sue her for damages for withholding any marital right? Where then are the parties to stop? What a vast new field will thus be opened to litigation. Little did sober legislators conceive of the result of these new creations by construction, when they were engaged in making a *protective* statute to secure the estates of married women; barely to state these results and consequences is in effect to give reasonable and practical interpretation to the meaning and intent to the statutes in question.

But at common law, before the passage of these statutes, though husband and wife were held to be but one *person* in law, still that *person* was represented by the husband in all courts and places, except in equity, where the separate rights

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of the wife could be sued for, defended and protected. In all other respects her legal existence was suspended; she was not known. The recent statutes made *in her behalf*, not his, have, to the extent expressed therein, enfranchised *her* as to those rights, and as to those only. They have extended no powers, they have conferred no new rights upon the husband. If, when her separate estate is affected, she can sue and sue alone, by them she is allowed even to sue her husband if he interferes with it to her disadvantage. They have not, certainly not in express terms, conferred the corresponding right on him to sue her. They were passed *for her protection*, not his. She has just such power as the statute expressly confers on her, no more. Nor has he any more. They have conferred none on him. They have released nothing to him. In *White v. Wager (supra)*, DENIO, J., says, page 332, "It is quite apparent, from the provisions of (these) acts, that the design was not to confer any additional advantage upon married men, but it was intended solely for the benefit of the other party to the marriage relation."

The statute of 1862 (chap. 172, § 3) does, in fact, confer upon a married woman the power in general terms to sue and be sued in all matters having relation to her sole and separate property; and also to recover damages for injuries to her person (which damages before belonged to her husband).

This is a conference or rather a restoration of marital rights upon her, not on him; and if it includes the right to sue him for interference with her separate estate, it does not, in terms, confer on him any right to sue her. But even as to her right to sue him, in an action at law, it has been adjudged to the contrary since the passage of that act in two General Term cases. (*Gould v. Gould*, 29 How. Pr., 441; *Longendyke v. Longendyke*, 44 Barb., 366.) These cases received much consideration by able and distinguished jurists, and we feel bound to follow their views.

The right to sue and be sued was a right that the *husband* always possessed before the statute, and independent of it. A statute conferring such a right on him would add nothing

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to his power in this regard. But could he, therefore, though possessing such a right, sue his wife? Why not? He had before all the power at common law that she had conferred upon her by statute. Did any one ever suppose that under this power he could sue his wife in an action at law upon a contract made between them? Does the conferring by law an equal power upon the wife increase his powers? If the unity of the relation is so severed by this act that he can sue her for his labor, may she not sue him for hers? May she not sue him for the labor and care of nursing and taking care of his children? Nay, may she not sue him even for the labor of bearing them? To what do not these several rights to sue extend? Where is the jurist that dares to draw a line to say how much of the disability is removed and how much remains, or to declare that no line of limitation exists?

Until the highest court of review shall otherwise determine, I shall feel bound to hold that the unity of a person, created by the marriage contract between husband and wife, has been no further severed than the statutes, *in express terms* or *by necessary implication*, have effected that purpose; that the duty of the husband is now as ever to labor and provide support for his wife, and that it has not been changed by these statutes; that these statutes have not conferred the right upon husband and wife to make contracts between themselves to that end. But, on the contrary, the legislature in the last of these statutes (Laws of 1867, chap. 887) recognize the *unity* of the persons and relations of husband and wife, in expressly reserving and exempting them from communicating or disclosing, even as witnesses, any confidential communications made by one to the other during their marriage. The legislature, it is very clear, then, regarded the sacredness and unity of the relation not dissolved, but as existing to some extent. If we are right in this view, the justice erred in nonsuiting the plaintiff as demanded.

I am not unaware that there are various cases holding that married women having separate estates may employ their husbands as agents to assist in managing them. But this is



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quite a different thing from the holding that the husband may bring an action against his wife at law for his services. This agency may be the best way in which he may labor to support his wife, or aid in doing so. She ought not to be deprived of this aid in managing her estate. This power to make contracts existed at common law, but it was as agent, not as an independent and separate individual. The wife might be the agent of the husband, and in that character *makes contracts* which would bind him; and such agency need not even be express, but was implied from a variety of circumstances. This is in aid of the purposes and comfort of married and domestic life; so, now, the husband may be the agent of the wife, in regard to her separate estate, and the term *contract* between them means just this—a contract of *agency*. So reading some of the *obiter* remarks found in the reports giving the word *contract*, as between husband and wife, this limited meaning, it is well enough; beyond this, it is calculated to mislead.

Nor am I unaware of the *obiter* remark made in the case of *Fairbanks v. Mothersell*, reported in 60 Barb., 407, as follows: "I suppose as the law now is in regard to the separate property of married women, they may make special contracts with their husbands, and let jobs to them of particular work, such as building and the like, the same as though they were strangers." From what we see of this reported case this remark was not at all necessary to the decision. It was not a question between husband and wife, or whether one could enforce at law such a contract against the other. It was a mere question of agency, so far as we can judge. The wife in that case had given the husband the job of digging a cellar and laying the cellar wall upon her separate property, as distinguished from the other part of the building. She agreed to pay him \$138 therefor, and did pay him, but could he have enforced the contract at law? The husband employed the plaintiff to assist, the plaintiff supposing at the time that the husband was the owner. Afterward finding out to the contrary and that the benefit and advantage was to the wife

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he sued the wife, treating the husband as her *agent*, and so the jury found the fact to be. This was right. The jury correctly found in the Justices' Court. The judgment was rightly affirmed on this ground in the County Court and by the Supreme Court. But I do not see how the question arises in this case that establishes the right of a husband to sue his wife at law. That question did not arise. The court does indeed remark, as I have said, *obiter*, that they suppose women may make contracts with their husbands. I concur in this if the appointment to an agency in such case can be called a special contract. I do not believe it is a legal binding contract existing between husband and wife. And as the point we have been considering was not in that case, it is, perhaps, a little unfortunate that the first marginal note of the reporter should be based upon an *obiter* remark. The case does not sustain this note. I should greatly hesitate to question the direct adjudication of that learned and able court, but they did not decide the question; it was not there to be decided.

But if we were even to look at this case upon the merits, conceding the right of the husband to sue, the case is without merit. An implied contract could never exist at law between a husband and his wife, whom he was bound to support, for services done for her. The implication is the other way. The fact that they had previously lived separate, by turns, proves nothing but a condonation when they again came together. If an express contract was proved, according to the plaintiff's own testimony, it was not only to be for a year, but was conditioned that he should not drink whiskey. I think his own testimony showed that there was no performance on his part, but on the contrary he proved a breach, and he should have been nonsuited. But I do not put much stress upon this review on the merits.

Since preparing the foregoing opinion two cases have appeared reported in 4 Lansing's Reports, viz.: *Adams v. Curtis*, 164, and *Minier v. Minier*, 421, which are supposed to be in conflict with the views above expressed. They are not so in the material point. In *Adams v. Curtis* the case

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was correctly decided upon what appeared in it. That was an action by a wife against a copartnership, of which her husband was a member. The husband did not appear in the case, and his copartner did not appear for him. It does not appear what were the pleadings nor what the issue tried. It only appears that the testimony showed that the plaintiff was the wife of the copartner Adams, and that she performed the work for the firm for which the action was brought. She was beaten in the Justice's Court. She appealed, and the County Court reversed the judgment; for what reason does not appear. In the Supreme Court the judgment of the County Court was affirmed, and the law was there discussed as to the right of a wife to sue her husband. The leading opinion, by MILLER, J., merely holds that such a contract could be made, and if made, could be maintained under the statute of 1862, at law. One member of the court, HOGEBOM, J., puts his assent to the decision on the ground that the husband not having appeared in the case nor any one for him, there was no one to object to his being sued or to a judgment against him, and that even if he could not be sued, his copartner Curtis was bound at all events, and he could seek contribution over from the husband. On either of these propositions the case is not in conflict with the views we have expressed above, that the statutes were passed *to enfranchise married women, and to protect their property, and not to protect or extend rights to their husbands.*

The case of *Minier v. Minier* (*supra*) is to the same effect, that a married woman may maintain an action against her husband to recover moneys intrusted to him by the wife, or for lands which had been purchased with such moneys and title taken in his name. Such has always been the law of equity, and the modern statutes have but extended it to actions at law. The only criticism to which this last cited case is subject is the *obiter* remark of the learned judge, that the act of 1862 "warrants the bringing of a suit both by a wife against her husband *and by a husband against his wife.*" This last branch of the sentence was not a question before

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the court, and I cannot give it my assent. It is in conflict with direct holdings in previous cases in the higher court, to wit, in *White v. Wager* (25 N. Y., 328) and in *Hunt v. Johnson* 45 id., 27). In this last case the court drew the distinction between an instrument made by a wife to her husband and one from a husband to the wife, even at common law. Referring to another case HUNT, J., says: "*That case differs from the present action; that was a conveyance by wife to the husband; this was by the husband to the wife. They do not necessarily stand upon the same basis in equity. It is the duty of the husband to provide an assured and comfortable support for the wife during her life and after his death. No duty rests upon the wife to provide for the husband. The custom of the country and the laws of the land look upon her as the party to be aided and sustained by the toil and wealth of the husband. An application of the husband's property for her comfort is eminently equitable, and has been favored by the courts from their earliest existence. No judge has yet announced that this equity or this favor is to be extended to gifts from the wife to the husband. There is, in the nature of things, a broad and palpable distinction against an equitable claim in the husband's favor.*"

Interpreting these statutes (including that of 1862) to be *in pari materia*, as if all were contained in one act, beginning with those of 1848 and 1849, entitled "for the more effectual protection of the property of married women; taking the common law as it has ever been declared; abrogating none of the common law by forced construction, not expressed by a statute; and giving due force to the maxim *expressio unius est exclusio alterius*," husbands are excluded from their provisions. The statutes of the State of Pennsylvania (Laws of session 1848, p. 536, &c.), which are almost identical with our own, have been so construed in their highest courts. In the case of *Diver v. Diver*, reported in 56 Penn., 109, STRONG, J. (now of the United States Supreme Court), said: "The design of this statute (1848) was single. *It was* not to destroy the oneness of husband and wife, but to protect the

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wife's property. To effectuate this object *she* is enabled to own and use and enjoy her property by removing it from under the dominion of her husband. It is to be as her separate property is enjoyed; as property settled to her separate use. *The act no more destroys her union with her husband than does a settlement for her separate use.* It is a remedial statute, and we must construe it so as to suppress the mischief against which it was aimed, *but not as altering the common law any further than is necessary to remove the mischief.*

There is, then, no doubt as to what the common law was and is. It is equally as clear that there is no *expression* of an intent in this statute to destroy the unity or oneness of husband and wife, except as to her, in the single particular of her control of her separate estate. There is no question that statutes are to be interpreted as not changing the common law, unless it is so expressed in terms or by necessary implication. There is nothing in the act of 1862 or in its title that intimates an intent to add new rights or remedies in favor of a husband. Looking, then, at the common law as still being in force, except as expressly changed by these statutes, let us see what are the expressions in the act of 1862, from which it is attempted to *imply* a power of destruction of the unity of the parties, husband and wife, further than is expressed. Section 7. "She may sue and be sued *in all matters having relation to her sole and separate property.*" But by whom may she be sued? By herself? Of course, not. By him who is in oneness or unity with her. Can he, the one-half of this united one, sue the other half, by virtue of this statute? He certainly could not sue by the common law. What language, then, is found in this statute that authorizes *him* to sue *her*? It is a universal canon of construction of statutes, that unless the provisions of a new statute are so repugnant to the common law that both cannot exist together, the common law is not abrogated, but remains in all its force. (Dwarris, Am. ed., 185, and notes.) This is the law of interpretation. True, the language of the statute of 1862, that

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she may sue and be sued, is broad enough, in general terms, to include all parties that are several and equal, and under no disability; but it does not include persons that are under disability. The husband is, under the common-law disability, unable to sue his wife.

This statute is not broad enough, and does not divorce him from that disability, whatever it may do for her. It is not broad enough to absolve *him* from the liability, as well as the duty, to labor for the support and maintenance of the wife. Far less does it authorize him to sue her for his support. Though in its language it does in one particular, and, in that only, enfranchise her, and confer rights on married women for a particular purpose, there is not an expression in it that confers new powers upon him. The marriage contract, with its liabilities, cannot be so severed by legislative or judicial construction in favor of a husband. He cannot be so released from a binding civil contract. Besides, such a contract is clearly against public policy. If, indeed, the statute contained an express provision to that effect, it would, I think, be void on the ground of its being retrospective in its operation upon marriages solemnized before its passage.

I have been the more inclined to meet and resist the construction claimed by the plaintiff thus earnestly at this time, because I have seen the disposition manifested in several *dicta*, which are already found in the reports, tending in that direction.

I regard such a construction as in effect judicial legislation, though in none of the cases has the question been necessary to a direct adjudication. It is entering into a new and unexplored region for judicial action. Its explorations are without compass or chart to direct its forward course or its retreat. The way will be found dark and full of stumbling blocks, and with no experienced guide. Until the legislature shall open the way or light up the path, I am not disposed to enter.

I think, upon the main question I have discussed above,

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that the judgment of the County Court and that of the justice should be reversed, with costs.

BALCOM, J., concurred.

MILLER, P. J., concurred in the result for the reasons stated in the following opinion :

MILLER, P. J. I cannot agree with the opinion of Justice POTTER in this case, that a married woman cannot be sued by her husband upon a contract made with him, and I think that such a construction of the provisions of the married woman's act would be in conflict with the adjudications of the Supreme Court, and especially with the decisions of the General Term of this department. The remarks of JOHNSON, J., in *Fairbanks v. Mothersell* (60 Barb., 406), which are quoted in the opinion of the learned judge in the case at bar, are entitled to great weight, even if they may be regarded as *obiter*.

The claim in the case referred to was for work done for the benefit of the married woman's estate, while the defence was that the husband had the contract and the work was done upon his employment of the plaintiff on his own account, and not for the defendant.

The court recognized the right of the wife to contract with the husband, but *held* that, as no part of the work was done on the husband's job, the case stood simply upon the employment of the plaintiff by the husband to work for his wife upon her separate property, without any express agreement whether he should be paid by the husband or the wife, and the defendant knowing the work he was doing, the law would imply a promise on her part to pay for the services, if it was in fact his work. I am not prepared to say that the remarks made are not applicable to the case presented.

In *Adams v. Curtis* (4 Lansing, 164) it was held that a married woman may maintain an action to recover for her labor or services under a contract made with her husband therefor, without showing that she carried on business on her own account, beyond that out of which the claim in suit arose. If she can maintain such an action, of course she could be

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sued for the same reason and under the provisions of the same law. It is there said: "The effect and intent of the act is to remove all the liabilities of coverture, so as to enable her to sue and to be sued, as to all contracts, in all respects as though she was in fact unmarried." The case of *Longendyke v. Longendyke* (44 Barb., 346) is commented upon, and it is said that the reasons assigned for holding that the wife could not sue the husband in an action for an assault and battery had no application.

In *Minier v. Minier* (4 Lansing, 421) it was held that a married woman may maintain an action against her husband to recover possession of her real estate, from which she is excluded by him. PARKER, J., says: "The terms and spirit of the statutes by which married women are invested with the same rights, in respect to their sole and separate property, as though they were sole, should be carried out by such construction as would allow the wife the same remedies against her husband as, in like cases, would be appropriate against other persons."

The effect of these decisions is to place the husband and wife in the same position toward each other as strangers, so far as their contracts are concerned, and such appears to have been the intent and spirit of the act.

True, it is an innovation upon old established customs, and many ideas which had become firmly fixed by a series of legal adjudications. But the true spirit of the act appears to have been to sweep away the rules governing the relations between husband and wife, as they formerly existed, and to establish new and different ones.

If we follow these decisions I am at a loss to see how we can hold that a contract between the husband and wife cannot be enforced in an action at law.

But while the law, as I understand it, upholds such actions, agreements between husband and wife should be carefully considered and be subject to the most rigid scrutiny. Before the husband should be allowed to recover for his services upon a contract with the wife, the proof should be clear strong



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and conclusive. The nature of the marital relation which obligates the husband to support the wife, or at least to render all the services in his power to that purpose, should induce great caution in allowing a recovery for services when engaged in the mere performance of this duty. Certainly so, where the case tends to show that the wife supported the husband instead of the husband supporting the wife.

According to the testimony of the husband on the trial there was no express contract, no promise to pay the husband for his services. The defendant was in possession of the hotel at the time and was to give up everything to plaintiff's charge, and he was to be the landlord. They were to keep the hotel together for a year, and if they could not make it go, were to sell out. The plaintiff told defendant what work he must do, but there were no explicit terms agreed upon which made a contract of the defendant to pay for services rendered, any more than a contract of the plaintiff to pay defendant for her services. It was only a mutual arrangement between a husband and wife, who had been separated from each other, to make an attempt to live together once more, and nothing beyond this. No contract can be implied from the facts presented, and certainly should not, as between husband and wife, under the circumstances existing.

The court were, therefore, wrong in refusing the motion for a nonsuit, and for this error the judgment should have been reversed by the County Court. As the County Court failed to do this there was error; and its judgment, with that of the justice, must be reversed with costs.

Judgment reversed.

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 Wormer v. Canovan.
 

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SQUIRE M. WORMER, Appellant, v. GEORGE CANOVAN,  
Respondent.

(GENERAL TERM, FOURTH DEPARTMENT, MARCH, 1872.)

An order, vacating an order of discontinuance without costs unless the plaintiff shall pay the defendant's attorney's costs, entered *pendente lite* on the stipulation of the plaintiff, his attorney, and the defendant, who was insolvent, after notice from defendant's attorney forbidding discontinuance without payment of his costs,—*Held*, to be proper relief on motion and affirmed.

Except as between the parties to an action, it is discontinued only upon entry of the order therefor.

Notice of claim for costs before entry of the order is in time, no value having been paid for stipulating to discontinua.

THIS was an appeal from an order made at a Special Term, vacating a discontinuance of the action. The facts are stated in the opinion.

*J. L. Parker* and *S. E. Day*, for the appellant.

1. The defendant having become insolvent after the commencement of the action, the court on the plaintiff's motion would have allowed discontinuance *without costs*. (1 J. R., 143; 2 id., 294; 18 id., 252.) It could not have been urged in opposition that no discharge, as an insolvent, had been granted to the defendant. The reason why the courts have sometimes refused to allow discontinuance without costs, unless a discharge is produced or shown, is because the court will not try the question of insolvency upon affidavits. (4 Hill, 594.) The plaintiff is not relieved on the ground that the defendant may defeat the action by pleading his discharge, but on the ground that the discharge affords conclusive evidence of the defendant's inability to pay. (8 Cow., 121; 1 Wend., 91.) In this case there is no question concerning the defendant's insolvency, because both parties allege it. 2. There is no case which goes far enough to show that a party who has not obtained a judg

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ment in his favor cannot settle a suit because it may prejudice the possibility or even probability that his attorney might obtain his costs by a future trial and by a judgment in favor of his client. (*Shank v. Shoemaker*, 18 N. Y., 490.)

In *Sweet v. Bartlett* (4 Sand., 661), the court says that an attorney has no lien for costs until a judgment is entered, or at least not till after verdict, and until the lien attaches the parties can settle the suit regardless of his claim for costs. (See, also, 103 Mass., 33, where the same doctrine is promulgated in a case very similar to the one at bar.)

*F. D. Wright*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

*By the Court*—MULLIN, P. J. The plaintiff sued the defendant in ejectment, and during the pendency of the action and before trial the latter became insolvent. The plaintiff, by his attorney, entered into a stipulation with the defendant, that the suit might be discontinued, without costs, and an order discontinuing the action was duly entered.

The defendant's attorney testifies that, before the stipulation was entered, he served notice upon the plaintiff's attorney that he forbade a settlement or discontinuance of the action until his costs were paid, on the ground that the defendant was insolvent. But the plaintiff and his attorney, disregarding the notice, entered into the stipulation and entered an order of discontinuance, without costs.

The plaintiff's attorney denies that the notice forbidding the settlement was served on him before the stipulation was signed, but the judge holding the Special Term must have held either that such notice was served before the stipulation was signed, or that plaintiff's attorney had notice of defendant's insolvency, and that his attorney claimed costs.

The Special Term set aside the order of discontinuance, unless plaintiff would pay the costs of defendant's attorney.

The plaintiff appeals from that order.

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The defendant's attorney had not, at the time the order of discontinuance was entered, any lien for costs as against his client or the plaintiff in the action.

Until judgment, or at least until the verdict, it could not be known that he would be entitled to costs, and until that question was settled there was nothing on which a lien could attach. (*Shank v. Shoemaker*, 13 N. Y., 489; *Brown v. Comstock*, 10 Barb., 67; *Sweet v. Bartlett*, 4 Sandf. 641.)

But, although the attorney has no lien for his costs before verdict or judgment, yet the court will set aside a settlement of the action before verdict, entered into between the parties, his client being insolvent, whereby he is deprived of his costs, when the opposite party has been notified of his (the attorney's) claim for costs, or when it is manifest that the object of the parties was to defraud him of his costs. (*Power v. Kent*, 1 Cow., 172; *Talcott v. Bronson*, 4 Paige, 501.)

When a settlement of a suit is made by the parties after notice of the attorney's claim for costs or in fraud of his right thereto, the court will not direct the payment of the costs, but it will set aside the settlement and permit the attorney to proceed to judgment, and thereby perfect his lien for his costs. (*Talcott v. Bronson*, 4 Paige, 501.)

The order in this case vacates the order of discontinuance, unless the plaintiff pays defendant's attorney's costs. This was precisely the relief to which the defendant's attorney was entitled.

To have vacated the order and thus compelled the plaintiff to proceed and try his cause before he could pay the defendant's attorney's costs, would have been very oppressive.

By the order granted he was enabled to pay the attorney's costs, and thus be relieved from further litigation.

Plaintiff might have moved, and for aught that appears before us he may still move for leave to discontinue, without costs. But until such relief is granted, he must either litigate the suit or discontinue on payment of costs.

The defendant's attorney swears that, on a day named by him, he served on the plaintiff's attorney a notice not to settle

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the suit without payment of his costs. The plaintiff's attorney swears that such notice was not served on him until after the stipulation was signed. This presented a question of veracity which the judge at Special Term has found in favor of the defendant's attorney, and I am not prepared to say it was decided erroneously.

But whether the notice was served before or after the stipulation was signed, it is certain that it was served before the order of discontinuance was entered.

An action is not discontinued, except as between the parties, until the order of discontinuance is entered. (Graham Pr., 603; *Averill v. Patterson*, 10 N. Y., 500; *Bedell v. Powell*, 13 Barb., 183; *Cook v. Brock*, 25 How. Pr. R., 356.) Notice to the plaintiff or his attorney, before the entry of the rule that the defendant's attorney claims costs, is sufficient, unless the plaintiff has parted with something of value as a consideration for the consent to discontinuance.

Nothing of that sort appears in this case.

The order of the Special Term must be affirmed, with ten dollars costs.

Order affirmed.

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JAMES MOORE, Respondent, v. THE ERIE RAILWAY COMPANY,  
Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MARCH, 1872.)

If a freshet floats the wood of different owners into a river where the property of one is mingled with and undistinguishable from that of the other, the owners become tenants in common.

And if one owner gather and take possession of the whole, he is not liable for conversion, but he holds it subject to the other's right to take his portion, and is entitled to compensation for his labor.

So held where the plaintiff had piled his wood before the freshet on defendant's premises.

In trover for his wood, by the plaintiff, one of the owners, against the defendant, the other owner, who had gathered and taken possession of it, evidence of demand upon the defendant's station agent, not shown to

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have authority to bind the defendant, and his refusal,—*Held*, inadmissible.

So also is evidence that defendant used the wood, where it does not appear whether sufficient to satisfy the plaintiff's claim was left.

There being no proof of conversion, and the court having charged the jury that the plaintiff, if they found for him, was entitled to interest from the time of conversion,—*Held*, that it was virtually a charge that there was evidence of conversion, and error.

THIS was an appeal from a judgment entered upon a verdict in the County Court. The facts are stated in the opinion.

*John Ganson*, for the appellant.

*Hudson Ansley*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. This action was commenced before a justice of the peace, of the county of Cattaraugus, to recover the value of a quantity of fire-wood, which it was alleged the defendant had converted to his own use. The defendant denied the complaint, and set up a counter-claim. The court rendered judgment in favor of the plaintiff and against the defendant for the sum of sixty-seven dollars and fifty five cents damages and costs.

The defendant appealed to the County Court; and on the trial in that court it appeared that the plaintiff, in the winter of 1865, drew and piled on the land of the defendant, near one of its stations, fifteen cords of hemlock wood. The defendant had piled near to that of the plaintiff a large quantity of hemlock wood, part of which had been sawed.

In March, 1865, there was a great freshet in the Allegany river, so that it overflowed its banks, and its waters extended to the wood of the plaintiff and defendant and carried it away, lodging part of it in the fields and part in the woods near by.

The wood of the plaintiff and defendant was so intermingled as to be undistinguishable.

The defendant caused the whole of the wood to be gathered

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and placed in its wood-shed, at an expense of seventy five cents per cord. The wood was worth four dollars to four dollars and fifty cents per cord.

Plaintiff's counsel offered to prove that he told defendant's station agent, at the station near which his wood was piled, that defendant's employes were going to pick up the wood, and he (plaintiff) would like to have his pay for it. This evidence was objected to by defendant's counsel. The objection was overruled, and the evidence offered received.

The court charged the jury that if plaintiff piled his wood in defendant's yard without permission, and it got mingled with defendant's wood without defendant's fault, so that it could not be identified, plaintiff was not entitled to recover.

That if plaintiff's wood floated away and got mingled with defendant's wood, defendant had the right to pick it up and pile it in its wood-shed, and plaintiff could not recover its value until defendant had used the wood, or did some other act converting it.

The court also charged that plaintiff was entitled to interest, if the jury found for the plaintiff, from the time defendant used the wood. To this part of the charge defendant's counsel excepted, on the ground there was no proof that defendant had ever used any part of plaintiff's wood.

The jury found a verdict in favor of the plaintiff for sixty-six dollars and twelve cents.

Judgment was entered for that sum, together with costs, and from that judgment defendant appeals.

The wood of the plaintiff and defendant became intermingled without the fault of either; hence neither lost his right to take the wood if he could identify it. But being indistinguishable the one from the other, they became tenants in common of the wood, each being entitled in the joint property to the number of cords of which he was owner before the confusion of the wood.

Each owner was entitled to collect the wood, and he was entitled to a compensation for his labor for the joint benefit from his co-tenants.

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The defendant might appropriate to its use the portion of the wood to which it was entitled, but it was bound to leave for plaintiff a quantity equal to his share; and such user was no conversion of the plaintiff's share of the wood.

But if defendant used the whole, or failed to leave for plaintiff his full share, the defendant was liable for so much as the quantity left fell short of plaintiff's share.

The plaintiff was not bound to wait in order to entitle him to his share until the whole was used or otherwise converted by defendant. He might have demanded his portion of the wood; and if defendant refused to allow him to take it, it would have been liable for the value of the wood.

No demand was made of the company, unless the conversation with the station agent, or the letter to the defendant's wood agent, was equivalent to a demand of the wood.

The conversation with the station agent was wholly incompetent, being wholly immaterial, unless it would be some evidence of a demand and refusal. The jury might have given that effect to the evidence. But it is not shown that the station agent had anything to do with the wood, or any authority to bind defendant in any way in reference to the wood.

The reception of this evidence is fatal to the judgment.

It was proved by plaintiff that he sent a letter to defendant's wood agent in reference to the wood, but received no answer. The agent says he received a letter from plaintiff; but whether it contained a demand for the wood or its value we are not informed. There is, therefore, no proof of a demand of and a refusal by the defendant or any authorized agent.

The only other evidence of a conversion is that of the plaintiff, who testifies that he saw the engineers of the defendant putting wood on to the engines from the sheds in which the wood, of which defendant's formed a part, was piled.

It does not appear but that they left in the shed the whole quantity to which plaintiff was entitled. Until it is shown that this was not done, there is no proof of conversion entitling plaintiff to recover.

The charge, so far as it related to the merits of the action



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is not excepted to. The portion of it relating to interest is excepted to. But if the allowance of interest was erroneous the judgment need not be reversed, as the defendant could be protected by a modification.

But this part of the charge had, I have no doubt, an important bearing in the minds of the jury on the question of conversion.

The court told the jury the plaintiff was entitled to interest from the time of the conversion. The counsel says, in effect, the jury cannot allow interest because no conversion was proved. This was the fact, yet the court permits the case to go to the jury, thus virtually saying there was evidence before them of conversion.

The court had not given them any instruction as to what constituted a conversion, as applicable to the case proved before them. They were left, therefore, with a very significant intimation from the court that there was evidence which would authorize the jury to find a conversion.

This principle was applied by this court in the case of *Reynolds v. The People*, decided at the March term.

The plaintiff in error was indicted for assault and battery with the intent to commit a rape. It appeared on the trial that there was really no force used, that the girl not only made no resistance to the indecent familiarities in which he indulged, but aided him therein. The court was asked to instruct the jury that there was no evidence of any intent to ravish, and there was none that an assault and battery had been committed. The court instructed the jury that they should not convict of the intent to commit the higher offence, but refused to instruct them that they should not convict of the lesser offence.

It was held that this was in effect an intimation equivalent to an instruction that there was evidence which would justify a conviction of assault and battery, and probably operated to induce the verdict. The conviction was for that cause reversed.

The judgment of the County Court is reversed, and a new trial ordered.

Judgment reversed.

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Osborn v. Robbins.

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JEROME A. OSBORN, Appellant, v. STERLING ROBBINS et al.,  
Respondents.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

Where the answer averred that the note in suit had been obtained through conspiracy to extort money, of which the plaintiff had knowledge,—*Held*, that there was no charge that plaintiff had been concerned in the conspiracy, and the declarations of the conspirators were not evidence against him.

Declarations of a former holder of a note are not competent evidence against any person deriving title from him.

THIS was an appeal from a judgment entered on the verdict of a jury.

The action had been previously tried, but the judgment therein reversed by the Court of Appeals. (*Vide* 36 N. Y., 365.) The facts are stated in the opinion.

*John D. Kernan*, for the appellant.

*Waterman & Hunt*, for the respondents.

Present—MULLIN, P. J., TALCOTT and JOHNSON, JJ.

By the Court—MULLIN, P. J. This action was brought to recover the amount due on a promissory note for \$500 made by the defendants, Sterling Robbins and Giles Robbins, payable in one year from date, with interest, to Burrell Rice and Esther Jane Rice, or bearer, and dated the 13th January, 1860.

1st. The defences were, that the note was obtained by extortion, duress and fraud, and to procure the settlement and abandonment of criminal proceedings instituted by the payees of the note against Sterling Robbins for rape upon said Esther, wife of said Burrell Rice, and that the plaintiff took it with knowledge of the purposes for which it was taken.

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2d. That it was without consideration, which fact was known to the plaintiff.

3d. That Rice and wife caused said Sterling to be arrested upon a charge of rape upon said Esther and to be taken before a justice in the village of Herkimer, and that said note was given to procure the release of said Sterling from said arrest, and that said proceedings were instituted in order to extort said note, the said charge being false and unfounded.

4th. That before giving the note said alleged wrong was settled and adjusted between the parties.

On the trial the defendant was permitted to prove, notwithstanding the plaintiff's objection, that Burrell Rice on the Sunday after the arrest told Horace Farmington that he (Rice) had settled the matter with Sterling Robbins for fifty dollars; that he had arrested Sterling and been to Herkimer, and they had settled the matter by taking a \$500 note, and Sterling was left at large; that he had consulted the plaintiff, and he had advised him that he should have him arrested; that he might as well have \$500 as fifty dollars.

The reception of the evidence is sought to be justified on the ground that a conspiracy existed, of which the plaintiff was a member, to cause said Sterling to be arrested on a false charge, and thereby compel the payment by him of \$500 in order to settle and compromise it, and that the plaintiff was a party to such a conspiracy; and therefore the declarations of one of the conspirators was competent evidence against the other.

The difficulty with this reasoning is that it has no foundation in fact. There is no charge in the answer that the plaintiff was a party to any conspiracy to accomplish the object suggested or any other. The charge is that he knew when he took the note that it was made for an unlawful purpose, and therefore he was not a *bona fide* holder.

The declarations of Rice were those of a former holder of the note, and not competent against any person deriving title from him, and most certainly not against the plaintiff, who is a holder for value, although it may be with notice.

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The evidence thus improperly received was material upon the question of the purpose for which and the circumstances under which the note was given, and as affecting the *bona fides* of the plaintiff's ownership.

The judgment must be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

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IMOGENE O. BROWN, Respondent, v. JOHN C. CLIFFORD,  
Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

Questions of law decided on appeal from a verdict rendered on a feigned issue, are *res judicata* in the action.

It is competent in equity to prove by parol that a deed, absolute on its face, was intended as a security for a loan, and without regard to the question whether it was given through fraud or mistake.

On the trial of a feigned issue to determine if an absolute deed was intended as a mortgage, the rules in equity govern the admission of evidence.

Supreme Court Rule 40, which provides that neither party, where a feigned issue has been tried, shall question the rulings at the final hearing or subsequently, unless he has moved for a new trial, does not preclude the court, when the case is brought on for final hearing, from rejecting the verdict and ordering a new trial *ex mero motu*, or from deciding the question of fact for itself.

And the court may, likewise, accept the verdict upon the facts found.

Whether a deed absolute was intended as a mortgage is a mixed question of law and fact.

Where, in an action alleging that by agreement at the execution and delivery of an absolute deed it was taken as mere security, a feigned issue, presenting the question whether the deed was made and executed as security, was tried, and the jury found affirmatively. *Held*, that the finding was substantially that the agreement averred in the complaint had been made.

THIS was an appeal from a judgment entered on confirmation of a referee's report.

The plaintiff in his complaint alleges that in November, 1864, William O. Brown, Jr., was the owner in fee of the lot

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of land in Cook county, in the State of Illinois, described in the complaint, subject to a lien by way of mortgage to one Elias Greenbourn, for the sum of \$2,500.

Previous to the 25th November, 1864, the defendant, who was a brother-in-law of said W. O. B., Jr., had loaned to the latter divers sums of money, amounting to about \$900.

On the last-mentioned day, it was agreed between said Brown and the defendant that he (defendant) should loan to B. enough in addition to that already loaned to amount to the sum of about \$1,000, and that he would pay to Greenbourn the \$2,500 due to him, and the taxes and assessments on said land, and he, said B., would and did execute a deed conveying to defendant his (B.'s) interest in the lands as security for the repayment of said moneys, and for no other purpose. Defendant paid in pursuance of said agreement not exceeding the sum of \$6,500, for the security of which he holds the said land.

No time was agreed on when said B. should repay said moneys, but he was at liberty to pay the same at any time, with interest, and upon the payment thereof he (defendant) agreed to reconvey said premises free and clear of all encumbrances.

That although said deed was in form an absolute conveyance in fee, it was in fact a mortgage for the security of the moneys advanced by defendant.

The defendant, since he received the conveyance from said Brown, has sold and received for the said land \$38,041.33, and conveyed the same in fee, thus putting it out of his power to reconvey said lands to said B. or his grantees. At the time of said sale, B.'s interest in said lands was worth the said sum of \$38,041.33, and he never consented to such sale.

That said Brown and the plaintiff, as assignee, are ready and willing and offer to repay said moneys so loaned and advanced by said defendant.

That said Brown assigned his cause of action against said defendant to one Towner, before suit brought, and Towner before suit, assigned the same to the plaintiff.

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The defendant is by reason of the premises indebted to the plaintiff in the sum of \$31,541.33, the payment of which she has demanded, but which defendant has refused to pay, and that she has called on him to account concerning the several matters aforesaid, which he has refused to do.

The plaintiff prays that an accounting may be directed and that she may have judgment for such balance as may be found due to her, and for such other or further relief as may be just.

The defendant in his answer denies that said property was conveyed to him by way of mortgage, but, on the contrary, he alleges it was conveyed to him absolutely and in fee, without any condition whatever.

After issue was thus joined, the following issue was framed to be submitted to a jury, viz.:

Was the instrument dated November 28, 1864, and recorded December 1st, 1864, in book 287, page 540, Cook county, Illinois, mentioned and described in the complaint in this action, made, executed and delivered by said William O. Brown, Jr., to said John C. Clifford as a security for the payment of money by said W. O. Brown, Jr., to John C. Clifford?

This issue was tried before a jury at a Circuit Court, held in and for the county of Erie.

On the trial, William O. Brown, Jr., was examined as a witness, and testified that the conveyance to defendant was executed under an agreement that he should hold said land as security for moneys advanced to or for him, and that he (B.) should have the right to redeem the same at any time, on repaying the moneys advanced and interest thereon.

Frederick Brown, a brother of William, was also called and examined as a witness on behalf of the plaintiff, and testified that he was at defendant's on one occasion, and was called into the library where defendant and W. O. B. were, and the defendant then told him that he had taken a conveyance of the land as security for a debt, and would reconvey on payment of the moneys so advanced.

The defendant and his wife were examined on the part and

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behalf of the defendant, and they testified, in substance, that the conveyance to defendant was not by way of mortgage, but absolutely in fee, in payment of moneys due and owing from said B. to the defendant.

The jury rendered a verdict, in and by which they found the issue so submitted to them in the affirmative. A motion was afterward made at a Special Term for a new trial on a case containing exceptions, and the said motion was denied. From that order an appeal was taken to the General Term.

The defendant also moved for a new trial on the ground of newly discovered evidence, which motion was denied, and from the order denying it the defendant appeals to the General Term. The order refusing a new trial was affirmed by this court at the September General Term, 1871. In April, 1871, the cause was tried at the Special Term, held by Mr. Justice DANIELS.

On the trial the plaintiff put in evidence the verdict of the jury upon the question submitted to them, also the assignment from W. O. Brown, Jr., to Towner, and from Towner to the plaintiff.

The plaintiff then rested, and the defendant's counsel then insisted that, in order to entitle the plaintiff to recover in this action, she must prove the express agreement set up in the complaint.

That the verdict does not prove or tend to prove such agreement.

That the verdict merely determined a question of law, which it was the duty of the court to decide, and not that of the jury.

That the issues made by the pleadings had not been tried or determined.

An order for an accounting could not be made until W. O. B., Jr., was made a party.

These objections were overruled, and the defendant's counsel excepted.

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The court held that on the case made by the pleadings and proofs the plaintiff was entitled to recover.

The defendant's counsel then offered in evidence the case and exceptions, made to procure a new trial of the feigned issue, for the purpose of moving thereon for a new trial. They were received in evidence, but the court refused to entertain a motion for a new trial thereon, holding the verdict conclusive in the action, to which decision defendant's counsel excepted.

The defendant's counsel also offered to read the affidavits used on the motion for a new trial on the ground of newly discovered evidence, for the purpose of having that motion again heard.

The court allowed them to be read, but refused to permit the motion to be made, and to such decision the defendant's counsel excepted.

The court then found that the deed to defendant from Brown was given as security for the loan of money.

That before suit defendant sold the premises in question, and conveyed the same.

The court ordered judgment, that there be an accounting before a referee, and that the plaintiff was entitled to recover such balance as might be found due her on such accounting.

An accounting was had before the referee appointed pursuant to said judgment, who found due from defendant to plaintiff the sum of \$32,694.90.

From the judgment entered after the confirmation of the report of the referee, the defendant appeals to this court.

*William H. Greene*, for the appellant.

*William H. Gurney*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. Before proceeding to examine the questions arising on the appeal, it is necessary to ascertain what



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questions have already been decided in order that we may know what questions the appellant's counsel is at liberty to call upon us to consider.

After the trial of the feigned issue the case shows that a motion was made at Special Term for a new trial of said issue. That motion was denied, and on appeal to this court the order denying the motion was affirmed.

The exceptions taken on the trial presented the question whether parol evidence that the deed from Brown to the defendant was given as security on a loan of money was admissible, that question was discussed at great length by the appellant's counsel and this court affirmed the order.

That question as well as the regularity of the practice in framing and trying that issue must be treated as *res judicata* in this court.

But if the question was properly before us the decision of the judge at the circuit must be affirmed.

Whatever the rule of evidence may be in a court of law, in equity it is definitively determined by the court of last resort in several cases that it is competent to prove by parol that a deed, absolute upon its face, was intended to be a security merely, and it was not necessary to prove, in order to render such evidence admissible, that this deed was given through fraud or mistake. (*Hodges v. Tennessee Marine and Fire Ins. Company*, 4 Seld., 416; *Despard v. Walbridge*, 15 N. Y., 374-379; *Vandusen v. Worrell*, 3 Keyes, 311; *Loveridge v. Oyer*, cited by HUNT, J.; *Sturtevant v. Sturtevant*, 20 N. Y., 39; *Mulford v. Muller*, 1 Keyes, 31; *Tibbs v. Morris*, 44 Barb., 138.)

The cases on this point will be found collected in 2 Abb. Dig., 677, §§ 935, 936, 937 and 938.

I have said that parol evidence was admissible, although no fraud or mistake in making the deed was alleged or proved, and I say this, because in nearly all of the cases cited, and in numerous others upon the same point, no fraud or mistake was either alleged or proved, nor was any suggestion made that any such allegation or proof was necessary to justify the

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court in admitting the parol evidence. Chancellor KENT, in *Story v. Stewart*, 4 J. C. R., says it was fraudulent for the grantee, in deed shown to be a mortgage, to insist that it was an absolute conveyance.

It cannot be doubted but that equity would reform a deed which was in terms absolute, but which was intended by the parties to be a mere mortgage, and was put in the form of an absolute conveyance by mutual mistake, or by the fraud of the grantee.

I am not certain whether the appellant's counsel intends in his points to insist that because the feigned issue was tried in a court of law the rules of evidence applied in those courts should have been applied in determining the admissibility of the parol evidence.

If he does, I apprehend he is mistaken. It would be grossly unjust, under pretence of trying a question of facts by a jury in an equitable action, to deprive the party of the right of having his rights determined according to the principles of equity which are administered in the court in which his action was brought.

In all cases in which the question whether a deed was intended as security, the feigned issue must be found against the party alleging it to be a mortgage, if it be true, as it is claimed, that at law parol evidence cannot be received to convert a deed into a mortgage. When the verdict was produced in the court of equity, obtained under such evidence, the court would be bound to disregard it, or do the party insisting that the deed is a mortgage a grievous wrong.

Where the courts of law and equity were composed of judges whose duties were confined to the courts for which they were appointed, a motion for a new trial of a feigned issue could only be made to the court by which the trial was ordered. (1 Barb. Ch. Pr., 455, and cases cited.)

If a new trial is not ordered, the court, as a general rule, accepts the verdict as conclusive on the question of fact, but it is not bound to do so. The trial is to satisfy the conscience of the court as to a fact in regard to which the parties differ,

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and unless the finding of the jury does satisfy its conscience, it may disregard the finding and decide the question of fact for itself. (Adams' Equity, 376; note [1], 377, and cases cited.)

Rule forty of this court, which provides that neither party in a case on which trial of a feigned issue has been had shall be allowed to question the rulings on the trial at the final hearing or subsequently unless he has moved at Special Term for a new trial, does not preclude the court when the cause is brought on for final hearing from rejecting the verdict and ordering a new trial, on its own motion, or from deciding the question of fact for itself.

If it may not do this, the whole object of framing and trying an issue fails. If the finding is conclusive, the court would never be safe in ordering the trial of such an issue.

I am, therefore, of the opinion it was competent for the defendant at the trial of the issues to call on the court to reject the finding of the jury on the feigned issue and order a new trial, or to require the plaintiff to establish *de novo* the facts charged in the complaint.

It was equally competent for the court to refuse the application and to accept the verdict as a proper disposition of the question of fact, as was done.

The appellant's counsel insists that the court should not have accepted the finding on the feigned issue as decisive of the question of fact, because the question submitted to the jury was one of law and not of fact.

Whether a deed which, on its face, conveys the premises covered by it in fee is and was intended to be a mortgage, is a mixed question of fact and law. It is a mortgage only when it was the understanding and agreement of the parties that it should be a mortgage.

The question presented in the feigned issue is, whether the deed given by Brown to defendant was executed and delivered as security for the payment of money.

It would have been more in conformity to the practice if the question submitted had been whether the agreement set

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out in the complaint had been made. But the question submitted is substantially the same; a finding of either in the affirmative establishes the character of the deed.

But, again, the appellant's counsel was doubtless heard as to the form of the question, and acquiesced in the one adopted. At all events it does not appear that he has at any time objected to it, and he cannot now be heard to allege it was improper in form, unless it is so clearly so as to make it proper for the court to reject the verdict on that ground.

I have no doubt but that it was understood, when the issue was framed, that it presented the question whether, by the agreement of the parties, the deed was to be a mortgage. It may be thus understood; and, thus understood, it was sufficient in form and the verdict decisive of the question.

It is altogether too narrow a view of the question to say that the question submitted to the jury does not embrace the facts set up in the complaint. If an agreement between Brown and defendant that the latter should advance moneys in addition to what he had already advanced to and for said Brown, and that Brown should execute and deliver a deed of said land as security for the payment thereof, when proved, converts the deed into a mortgage, surely, the finding that the deed was executed and delivered to defendant as security for money loaned must have the same effect on the deed.

We must, at this stage of the cause, deal with substance rather than form. The judgment should be affirmed with costs.

Judgment affirmed.

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Roberts v. Roberts.

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PETER ROBERTS, Respondent, v. DAVID M. ROBERTS,  
Appellant.

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(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

The right to enter upon the servient estate for the purpose of repairing a structure to which it is subject as an easement, attaches to the dominant estate.

So held, where, by conveyance of a part of a tract of land, openly and visibly benefited by a ditch on the remainder, an easement in the ditch, passed to the grantee.

It seems, however, that the burden imposed cannot be made greater than it was at the time of the conveyance.\*

Planking and erections put up on the servient estate with consent and assistance of the servient owner, to prevent escape of water from the ditch upon the dominant estate, will not, in the absence of proof, be assumed to increase the flow of water on to the servient estate in an action to restrain the servient owner from removing them; nor are the planks and erections presumptively more injurious than the ditch at the time of the grant.

THIS was an appeal by the defendant from a judgment entered for the plaintiff upon the decision of the court.

Silas G. Roberts prior to the 19th January, 1867, owned a farm situate in the town of Nunda, in the county of Livingston, consisting of 104 acres of land. The Kishiqua creek ran across the farm in a westerly course, and its waters at high water overflowed a part of it. To remedy this and to drain a small pond on the land, he dug, some eighteen years prior to the action, a ditch from the creek across his farm, so as to carry off the water and drain the low land. The earth taken out of the ditch was put on either bank, and by these banks the water was prevented from flowing on the low land north of the ditch. He also erected a fence on the north bank of the ditch, and in 1867 conveyed all of the land north of the fence to the plaintiff and all the land south of it to the defendant.

In 1868 there was a freshet and the waters overflowed the

\* See *Beals v. Stewart* (6 Lans., 408).

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ditch, and washed away its banks, and flowed on to plaintiff's land, doing it considerable damage. After the water subsided the plaintiff made embankments on the bank of the ditch, with the consent and approval of the defendant; at one place putting in stakes and nailing planks to them, so as to effectually stop the flow of the water from the ditch on to his land. At the time these planks were put in, the water had ceased to run along the ditch, but flowed on to the land of the plaintiff.

In the spring of 1870 the defendant removed the plank so put into the bank, and also destroyed other barriers, erected to prevent the flow of the water on to the plaintiff's land, and threatened to remove any and all obstructions which might be put on said bank. This action was brought to restrain the defendant from removing the erections on the banks of the ditch to prevent the flow of water on to plaintiff's land.

The court found the facts above stated, and, as matter of law, decided that the ditch, by the acts of the parties, had become, and was in legal effect, the lawful channel for the water of the creek, and that defendant took his conveyance from Silas G. Roberts subject to the rights of the parties to have the ditch kept open and in repair for the discharge of the waters of the creek at their ordinary height at all times; that the plaintiff had the right, after the banks were washed away, to restore them and prevent the flow of water on to his land, and that plaintiff had also the right to remove, from the ditch, any impediments therein to the flow of water, and to clear out and repair the same; and that the removal of the erections, by the defendant, was an infringement of plaintiff's rights; and the avowal of the purpose to continue to remove such erections as should be thereafter placed, by plaintiff, on the bank of the ditch, was a virtual denial of plaintiff's right, to have the ditch kept open and in repair, and justified the plaintiff in bringing the action. A perpetual injunction was thereupon ordered against the removal of such erections as plaintiff might put up to prevent the flow of the water on to

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his land, together with the costs of the action. The defendant appealed.

*F. C. Peck*, for the appellant.

*H. Chalker*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The case of *Lampman v. Milks* (21 N. Y., 505) disposes of the merits of this case. It was held in that case that when the owner of land has by any artificial arrangement effected an advantage for one portion to the burdening of the other, upon a severance of the ownership the holders of the two portions take them respectively charged with the servitude, and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted. In that case, as in this, the owner of the land had diverted a stream of water through an artificial channel, so as to relieve a portion of it formerly overflowed, which he then conveyed. It was held that neither such owner nor his grantees of the residue could return the stream to its natural channel to the damage of the first grantee.

This case establishes the right of the plaintiff to have the water flow in the ditch and to have the ditch kept in the condition it was at the time of the grant. But it does not hold (as the question was not in the case) that plaintiff might enter on defendant's premises and repair the ditch. That precise point was decided by the Supreme Court of Massachusetts in *Thayer v. Payne* (2 Cush., 327).

In that case a drain from defendant's cellar extended on to plaintiff's land when the latter conveyed the house, &c., to the defendant. The drain becoming obstructed, defendant entered to repair it, and plaintiff sued in trespass for the unlawful entry. The court held the entry lawful.

The plaintiff could not make the burden imposed by the ditch any greater than it was at the time of the conveyance to the parties. At that time the judge finds that the ditch

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was about five feet wide and of a depth of from one to six feet.

After the flood of 1868, which swept away the banks of the ditch, plaintiff, with the consent and assistance of defendant, put stakes into the bank and nailed planks to them in order to prevent the escape of water from the ditch. It is not found whether the planking and other erections put up since 1868 had the effect to increase the flow of water on to defendant's land.

If they did, the defendant had the right to remove them. Unless this fact is found affirmatively, we must assume that the erections of the plaintiff did not increase the flow on to defendant's land, especially as he aided in and consented to the putting in plank, &c., which he subsequently removed, and of which he now complains.

No stress is to be laid on the consent and aid given by defendant to putting plank, &c., by the plaintiff as being a license so to do and binding upon him as such. As a mere license it was revocable, and when revoked the rights acquired by plaintiff under it terminated.

But the consent and assistance of defendant are evidence that the erections of the plaintiff were not any more injurious to him than the ditch was at the time of the grant, and if not he had no right to destroy them.

The increase of the height of the planking does not necessarily increase the flow of the water on the defendant's land, as that result may be counteracted by the lowering of the bank at other points. If such was the necessary effect of it, it should have been proved, and the court should have been called upon to so find.

We cannot assume that the planking produced any additional injury to the defendant. The judgment should be affirmed.

Judgment affirmed.



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Appelgate v. Morse.

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HANNAH M. APPELGATE, Respondent, v. CORNELIA D. MORSE  
et al., Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

An objection does not lie on appeal because a judgment, gives the relief intended more minutely than specified in the decision, if the relief is not enlarged.

In an action to restrain the defendant, an owner and occupant of adjoining premises, from interference with the plaintiff's right to draw water from a well thereon, the court, upon a finding that by arrangement between the builder of the well and owner and occupant of the plaintiff's lot it had been owned and used in common by the adjoining owners and their successors in title, under claim of right, gave judgment for plaintiffs. *Held*, error, as the finding was not a sufficient foundation upon which to base an inference of right by prescription, but amounted to a finding of a mere license.

A right to use the waters of a well, as owner of land on which it stands, must be asserted at law; but where it is sought to restrain interference with the enjoyment of an easement to use a well on another's land, the action is equitable.

THIS was an appeal from a judgment in favor of the plaintiff, entered upon the decision of the Special Term. The facts were these.

The plaintiff and defendant, Cornelia D. Morse, are owners of adjoining lots in the village of Penn Yan, in the county of Yates. At some time between the years 1831 and 1835 a person then owning and in possession of the lot now owned by the defendant dug a well on the northerly side of it, and within its boundaries.

About the year 1835 a house was built on the lot now owned by the plaintiff, and the occupant thereof drew water from the well by the permission of the then owner of defendant's lot.

The successive owners of plaintiff's lot have continued to draw from the well without let or hindrance, and under, as the referee finds, a claim of right so to do.

Some witnesses testify that the fence on the line between the lots of the parties ran at one time so that the north side of the curb formed part of the fence. Others testify that at a

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later day the fence ran to the center of the curb and now it runs over the center of the curb, each party having a chain pump on her own side of the well.

The defendant, by her agent, some time before the commencement of this action, moved the part of the division fence at the margin of the highway about a foot north of where it formerly stood, cut off a part of plaintiff's gate so as to make it conform to the narrowed gateway, and threatened, as plaintiff alleges and as the referee finds, to remove the division fence on to what she calls the true line, and so as to deprive the plaintiff altogether of the use of the well.

The plaintiff, by her complaint, prayed for an injunction to restrain the defendant from depriving her of the use of the well and to compel the defendant to move back the northeast corner part of the division fence and for damages.

The court found, amongst other matters, that those occupying plaintiff's premises had continued to use the well without interruption under a claim of right, which claim had been recognized by successive owners of defendant's lot until defendant threatened to remove the fence as above stated.

The court decided, as matter of law, that the plaintiff had acquired a right to the well by prescription, and ordered judgment that defendant be enjoined from depriving plaintiff of the free and uninterrupted use of the well, and that plaintiff recover costs.

*Charles G. Judd*, for the appellants.

*D. B. Prosser*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The appellant makes a preliminary objection that the judgment, as entered, does not conform to the decision of the court.

I do not discover that there is any material difference between the judgment, as ordered, and as entered. The latter

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gives the relief more minutely than it is stated in the decision, but that is unobjectionable so long as it does not enlarge the relief intended to be given.

It would have been better, perhaps, had the judgment declared that the plaintiff's right to the water should be enjoyed in common with the defendant, but it gives the plaintiff the right to the use of water, as claimed in the complaint, and the right so claimed is in common with the defendant.

The defendant may, if she so elects, amend the judgment so as to restrict the plaintiff's right to the use of the water to be in common with her.

The appellant insists that the decision that the plaintiff is entitled to the use of the water by prescription is erroneous, and for it the judgment should be reversed.

The finding of fact is that by some arrangement between Wilson, who constructed the well on defendant's lot, and Schofield, who owned and occupied plaintiff's lot, the well was owned in common, and the owners of plaintiff's lot have ever since continued to use it in common with those owning defendant's lot under claim of right.

Had the court found that there was a grant of the right to use the well all doubt would have been removed. But the fact found amounts to mere license.

Prescription is defined, in a work entitled *Law of Easements*, to be a title acquired by possession had during the time and in the manner fixed by law. (*Law of Easements*, 861.)

In the same work, at page 121, it is said: "The effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such case the user would not have been had with the intention of acquiring or exercising a right."

Again, at page 125, it is said: "Enjoyment had under a license or permission from the owner of the servient tenement confers no right as to the easement." (*Angell on Watercourses*, §§ 213, 216.)

The author, in the section last cited, says: "The enjoyment

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of an easement had under the license or permission from the owner of the servient tenement is consistent with the right of the latter, and consequently confers no right to the easement."

If this is the law, the finding of fact is fatal to the judgment.

The plaintiff in her complaint put her right to the use of the water of the well on the ground that she owns one-half of the land in which it is dug.

If she could get the water from the part of the well on her own land, her right for any interference with the right is at law, not in equity.

If, in order to obtain the water, she must intrude upon the land of the plaintiff, either on or below the surface, so as to constitute her right an easement, she should so allege in her complaint, as a court of equity can afford her relief by restraining defendant from interfering with her in the exercise of the right, but it cannot give her the relief she would be entitled to in an action of trespass or ejectment.

On the case as made in the complaint, and on the facts found by the court at Special Term, I am of opinion the plaintiff is not entitled to the relief granted, and the judgment must therefore be reversed and a new trial granted, costs to abide event.

Judgment reversed.

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MARY KESSLER, Respondent, v. THE NEW YORK CENTRAL  
RAILROAD COMPANY, Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

A railroad company which sells passenger tickets for its own road, with the ordinary coupons attached for connecting roads, to a point beyond its own terminus, in the absence of proof of agency, as partner, or otherwise, for such roads, contracts for through transportation to that point. But the intermediate carriers are only responsible for transportation over their respective lines.

Upon a question as to the terms of the contract, in the absence of proof as to the form of ticket, it may be assumed to have been in the ordinary form, viz. : Entitling the holder to the passage on presentation of the coupons to the carriers named therein.

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Where it was shown that the plaintiff purchased a ticket from the railroad company for conveyance over its own line, with coupons attached for connecting roads, and received on delivery of her baggage a check marked with the name of each road, and that the defendant, the last carrier, failed to deliver the baggage for the check at the point of destination,—*Held*, that there was no proof of delivery to the defendant or of loss while in its possession, and that the defendant was not liable.

THE plaintiff sued to recover a quantity of clothing belonging to herself and her husband, together with bed and table linen which she inclosed in a bag and delivered to the baggage agent of the Baltimore and Ohio Railroad Company, at the city of Washington, to be carried from that place to Buffalo.

The plaintiff purchased of that company and paid for tickets for herself over its road and the roads connecting therewith between Washington and Buffalo; the connecting roads were the Philadelphia, Wilmington and Baltimore Railroad Company, The Camden and Amboy, the defendant and The New Jersey Transportation Company.

The plaintiff received coupon tickets for each of said roads. There was no other contract between the plaintiff or any or all of said companies than is evidenced by the tickets and the coupons thereto attached, which were delivered to the plaintiff at Washington.

After the purchase of her ticket she presented the bag containing the property above mentioned to the baggage agent and received therefor a check numbered 651, which had on it the word Buffalo and the initial letters of the names of the several railroad companies above named, with the above mentioned number and the word Washington.

The plaintiff got on to the cars on the day of the purchase of her ticket (the 29th September, 1870) and rode to Jersey City, passed over the Hudson river in a ferry-boat and took the defendant's cars between ten and eleven o'clock on the same night and rode to Buffalo, and arrived there at twelve o'clock the following day. On her arrival she presented her check to defendant's agent and demanded her baggage, which

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was not delivered, and, although often demanded, had never been delivered.

The cause was referred to a referee who found the foregoing facts and also the value of the property, and ordered judgment in favor of the plaintiff therefor. From that judgment the defendant appealed.

*A. P. Laning*, for the appellant.

*Benjamin J. Austin, Jr.*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The Court of Appeals has decided :

1st. That it is competent for a railroad company to contract to carry passengers and freight beyond the terminus of its own line over other roads and even into other States than that in which such company is located. (*Maghee v. The Camden and Amboy R. R. Co.*, 45 N. Y., 514, and cases collected by ANDREWS, J., at page 518; *Burtis v. Buffalo and State Line R. R. Co.*, 24 id., 269; see, also, *Cary v. Cleveland and Toledo R. R. Co.*, 29 Barb., 35.)

2d. Where such a contract is entered into, the company thus contracting is liable for injury to the passenger and for loss or injury to his baggage over any of the roads over which such company has contracted to carry him. (*Quimby v. Vanderbilt*, 17 N. Y., 306; *Hart v. Rensselaer and Saratoga R. R. Co.*, 4 Seld., 37; *Root v. Great Western R. R. Co.*, 45 N. Y., 525.)

3d. Where such a contract is made, the connecting road over which the passenger is carried is only liable for loss or injury to baggage or injury to himself happening on its own road. (*Root v. Great Western R. R. Co.*, *supra*; *Burtis v. Buffalo and State Line R. R. Co.*, 24 N. Y., 269, 272.)

4th. When no contract is made by any one of several roads to carry a passenger beyond its own line, each company is liable only for loss or injury happening on its own road, and

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to render it liable for loss of or injury to baggage, it must be shown to have received it.

5th. These principles apply to freight as well as to contracts for the carriage of passengers and their baggage.

It follows from these decisions that if any contract was made for the carriage of plaintiff from Washington to Buffalo, it was made by the Baltimore and Ohio Company, as it is not shown that the agent who sold the ticket had any authority to bind the defendant by such a contract, nor that it was a partner with the connecting companies in carrying passengers between Washington and Buffalo. (*Hart v. Rensselaer and Saratoga Railroad Company*, 4 Seld., 37.)

In the absence of all evidence on the subject, except such as may be inferred from the delivery of the coupon which gave the plaintiff the right to ride over defendant's road from New York to Buffalo, the presumption would be that the Baltimore and Ohio Railroad Company had purchased of defendant such coupon or the right to issue it, and that it was delivered by that company in part performance of its contract to carry from Washington to Buffalo. (*Quimby v. Vanderbilt*, 17 N. Y., 306.)

The defendant not being a party to a contract to carry plaintiff over any part of the distance beyond its own line, it is not liable for any breach of such a contract.

The question then is, did the plaintiff's baggage come into the possession of the defendant? If it did, it was liable for its loss; if not, it was not liable.

The plaintiff had no knowledge of what became of her baggage after she delivered it to the baggage agent at Washington.

None of the agents or employes of the company, whose road terminated in Jersey City, nor any one employed in transferring baggage from Jersey City to defendant's depot in New York, testify to a delivery of said baggage to defendant's agents or employes in New York or elsewhere, nor to any facts from which such a delivery can be inferred.

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It is a fact which cannot be presumed from the delivery to the baggage agent at Washington.

He was not defendant's agent for any such purpose, and there is no other fact in the case which would authorize or justify such a presumption.

If enough had been proved to authorize the presumption of a delivery to defendant, the evidence of its agent at New York would not overcome it.

It is, however, unnecessary to consider his evidence, as a delivery is not proved, and without such proof the plaintiff cannot recover of the defendant.

There is no evidence in the case as to the form or contents of the ticket delivered to plaintiff at Washington.

We may assume that the ticket was in the usual form of such tickets, setting forth that the holder of it was entitled to a passage from Washington to Buffalo, on presentation of the coupons attached to the companies named therein.

If this was the form, then it was evidence of a contract by the Baltimore and Ohio Company to carry the plaintiff the whole distance.

If it was not the form of the ticket, but the company was the agent of the several companies to sell their coupons on receiving pay therefor, then each company contracted for itself, and is not liable for a breach of the contract entered into by any other company.

There is no distinction between the liability of connecting railroad companies for the carriage of freight and that for the carriage of passengers; and no rule of law is better settled in this State than that the defendant would not be liable for the loss of plaintiff's property, had it been carried as freight, and not on a contract to carry it with plaintiff, who was a passenger.

The judgment should be reversed and a new trial ordered, costs to abide the event, and reference vacated.

Judgment reversed.



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Sizer v. Syracuse, Binghamton & New York Railroad Co.

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ANDREW J. SIZER v THE SYRACUSE, BINGHAMTON AND NEW  
YORK RAILROAD COMPANY.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

Employes in special and dangerous services should be fitted, by the habits of carefulness, obedience, &c., which are necessary, for their safe performance.

If one is employed for such services with knowledge of his lack of such fitness, *e. g.*, one known to be disobedient where the safety of his fellow-servants requires implicit obedience, the employer is liable to his other servants or employes for injury resulting from such lack of fitness; but it is otherwise where knowledge of the unfitness is not brought home to the employer; or it seems to one who acts for the employer (a corporation) in hiring employes for the service.

THIS was a motion for a new trial by the plaintiffs upon a case and exceptions ordered to be heard in the first instance at the General Term. The facts are stated in the opinion.

*Pratt, Mitchell & Brown*, for the plaintiff.

*Geo. N. Kennedy*, for the defendant.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The plaintiff was in the employ of the defendant in January, 1870, in coupling cars and making up freight trains in its yard in Syracuse.

A locomotive engine was used in moving the cars when making up trains. The engine so used was operated by an engineer employed by defendants for that purpose; and while the engine was thus used the engineer was under the direction and control of the person employed in making up the trains.

On the morning of the 21st of January, 1870, an engine

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of the defendant called the Syracuse was employed under the direction and control of the plaintiff in making up a freight train in the defendant's yard. Frank Harvey was the engineer in charge of the said engine. Harvey had been for several months in the defendant's employ as fireman; and while so acting occasionally ran an engine, but was not and did not claim to be competent to run an engine as engineer.

The engineers are taken, as a general rule, from those who have acted for a considerable period of time as firemen, but are not entrusted with the charge of an engine until they have acquired experience in running engines under the supervision of a competent engineer.

On the morning in question the plaintiff directed the engineer, Harvey, to move two freight cars on to a bridge in said yard; and the cars were moved accordingly, and then the engine was stopped and the plaintiff proceeded to block the wheels of the cars. After that was done he desired the engineer to move forward the engine a little so as to enable plaintiff to uncouple the cars from the engine. The engine was put in motion as directed, the coupling pin taken out, and the plaintiff placed his left foot on the iron rail in front of the forward wheel of the tender in order to get on to the engine; the engine was put in motion while plaintiff's foot was on the rail, the wheel passed over the foot, crushing three of his toes so that amputation became necessary. The engine was stopped to enable plaintiff to remove the coupling pin on a grade descending, in the direction in which the engine was moving, of thirty to fifty feet per mile. The engineer started the engine without orders from plaintiff, while he was in the act of getting on to the engine.

There were many other facts proved, but they do not change those above stated. The court nonsuited the plaintiff on the ground that it was not proved that the injury resulted from any want of skill on the part of the engineer; that defendant was liable to plaintiff only for negligence in employing as engineer a person whom it knew to be incompetent when the

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injury complained of was the result of want of skill, but it was not liable for injuries caused to one of its employes by the negligence of another.

I will not consume time in an examination of the cases in which the question has been considered, when a master is liable to a servant employed by him for injuries resulting from the acts or neglect of another servant. ALLEN, J., in *Wright v. The N. Y. Central R. R. Co.* (25 N. Y., 562), has collected all the cases upon the question then decided, and from them has deduced certain principles which he holds conclusively established by the cases.

The fourth of the principles which he finds to be established is stated by him in these words:

The master is liable to his servant for an injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing for work to be done or for the use of the servant machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied.

The employer, he says, does not undertake with each or any of his employes for the skill and competency of the other employes employed in or about the same service, or for the sufficiency and safety of the implements and materials furnished for the work, or for the convenience or comfort of the laborer, since neglect and want of due care in the selection and employment of the agent or servant, through whose want of skill or competency an injury is caused to a fellow-servant, must be shown in order to charge the master. \* \* \*

Personal negligence is the gist of the action. It is not enough that the foreman and general superintendent of the work is guilty of negligence causing injury to the subordinates.

The fifth principle the learned judge holds to be decided is, that the servant cannot recover for injuries resulting through the unskillfulness of his fellow-laborers, if he has the same

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knowledge or means of knowledge of the unskillfulness that the employer has.

The sixth principle decided is, that it is not sufficient to charge the master for injuries to his servant that others of his employes were unskillful or incompetent, unless the injury complained of resulted from these causes.

If it was occasioned, notwithstanding such defects, by the negligence of a fellow-servant, the master is not responsible. (*Warner v. Erie Railway Co.*, 39 N. Y., 468.)

I entertain no doubt but that the principles thus laid down by the learned judge, state correctly the law of this State regulating the liabilities of masters for injuries caused by one of their servants to another.

There was sufficient evidence to carry the case to the jury on the question whether Harvey, the engineer, had such measure of skill as to make him competent to run an engine.

The superintendent who employed him knew the extent of his experience in the duties of an engineer, and it would seem to have been grossly careless to place such a man in so responsible a position.

But it does not appear that the injury to the plaintiff resulted in any degree from the want of skill on the part of the engineer, unless it was caused by the voluntary movement (if I may so call it) of the engine down the track, and which movement the engineer had omitted to guard against by applying the tank brake. The engineer says he thinks he did not start the engine after plaintiff had given the order to start ahead a little, but he is not positive about it. The grade is so descending that the engine will not remain stationary unless the tank brake is applied.

It is not pretended that this brake was applied. If the injury was done while the engine was in motion, without any agency of the engineer, the question would then arise whether the omission to apply the tank brake was the result of ignorance or carelessness. If the former, the defendant might be liable.

But the answer to this view of the case is, the plaintiff

himself testifies that the engineer did start the engine after he had uncoupled the cars, and while he (plaintiff) was in the act of getting on the engine, without orders so to do.

The engineer was clearly guilty of disobedience of orders. Whether his conduct was careless or reckless is not very material; it was disobedience to orders, that led to the injury.

The life of the man in the employ of the railroad company who makes up trains and uncouples cars, is at the mercy of the man in charge of the engine employed in the work.

The latter must be under the control of the former, and must render to him the most implicit obedience. If he does not, the most fatal consequences will almost inevitably follow.

The company owe it to those engaged in coupling and uncoupling cars to exercise the highest care in the selection of engineers to manage engines used in making up trains; men of strictly temperate habits, men who are careful, cool, discreet and obedient, only should be employed; and if men wanting these qualities are knowingly employed, and injury results therefrom, the company is as liable to the employee injured as if the engineer was unskillful.

The witness Ehl, on cross-examination, testifies that he had seen Harvey run an engine in drawing sand, and told Dawson, the person who employed the men engaged in the defendant's yard in running engines and making up trains, that he, Harvey, was careless in handling his engine and shifting cars in the yard. The witness, in answer to the question, What did you see him do that you regarded as carelessness? says: Not paying attention to signals and a great many things; breaking bumpers by his carelessness in shifting engines. He told Dawson that Harvey was not a fit man to run a shifting engine.

Had this been told to Dawson before the injury to plaintiff, and Dawson had, with knowledge of Harvey's character, continued to employ him, defendant might be responsible.

But the witness says he cannot say whether it was before or after plaintiff was hurt that he told Dawson that Harvey was careless.

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Unless it was before the injury, the defendant would not be liable.

I am unable to discover any way to get over this defect of plaintiff's proof.

The nonsuit was right, and the motion for a new trial must be denied, and judgment ordered for defendant.

Judgment for defendant.

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LAURA GRISWOLD, Respondent, v. WARREN GRISWOLD,  
Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

The owner of a mortgage made an unwritten agreement with the mortgagor, to satisfy it if he would discharge a disputed claim of an estate, of which he (the mortgagor) was sole beneficiary by will against a third person. The latter, with approval of the executor of the estate, gave a receipt for the claim, and released the executor from and indemnified him against all liabilities of the estate. *Held*, that the mortgage was discharged.

THIS was an appeal from a judgment entered for the plaintiff upon a referee's report.

The plaintiff, as executrix of the last will and testament of Manly Griswold, deceased, is the owner of a bond and mortgage, executed and delivered by defendant to one David H. Horton, on which there was due on the twentieth of March, 1871, \$555.

This action was brought to foreclose the mortgage. The only defence which presents any question considered on this appeal is the fourth, and it is in substance that Laona James died in the year 1857, leaving a last will, wherein and whereby she bequeathed to defendant and his wife all her property.

The only property of which the testatrix was owner at her death was a claim for \$1,000, due to her by Parley Griswold. Edwin Dennison was appointed executor of Laona's will, and after her death he duly qualified and took upon himself

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the duties of that office. He called on Parley for the amount due to the testatrix, but Parley denied any indebtedness, and said he would defend any action that might be brought to collect the claim. He offered to pay \$100 if he should be discharged from the debt. This offer was communicated to Manly, plaintiff's testator, who told the defendant that if he would accept the \$100 offered by Parley, and discharge him from the demand claimed to be due to Dennison, as executor, he would discharge the mortgage in suit. Defendant accepted the offer, gave Parley a receipt in full for the claim against him (Parley), under the will of Laona James, and defendants, Parley and Manly, executed and delivered to Dennison, as executor, a release, without seal, of all claims by them as heirs of Laona against Dennison, growing out of her estate, and agreed to indemnify him against the claim of any other person, arising out of said estate or out of his office as executor.

Manly never gave defendant a discharge of the mortgage.

The referee found the facts stated in the aforesaid defence, except that he finds that defendant's receipt to Parley was never delivered, nor did Parley give one to defendant. The referee found that the agreement of Manly to discharge his mortgage, being by parol, was void under the statute of frauds, it being in effect an agreement to answer for the debt of another.

Present—MULLIN, P. J.; JOHNSON and TALCOTT, JJ.

*J. G. Record*, for the appellant.

*D. Sherman*, for the respondent.

MULLIN, P. J. The judgment of the referee cannot be sustained. The undertaking of Manly was not to assume or pay the debt of any person, but it was to satisfy the mortgage held by himself against the defendant upon a new and sufficient consideration, moving between him and the defendant,

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upon the faith of his promise to satisfy the mortgage; the executor of Laona James, at the request of the defendant, discharged the claim he and his wife owned, as legatees under her will against Parley.

It is true that the executor never executed any technical release, but the legatees entitled to the debt did, with his assent and approval, agree to release Parley, and Parley and the other heirs of Laona released the executor from any claim they or either of them might have against him for the property of said estate.

This was done, because it was understood that Parley was released.

This was an accord and satisfaction. (*Palmerton v. Huxford*, 4 Den., 186; *Farmers' Bank of Amsterdam v. Blair*, 44 Barb., 641; *Neary v. Bostwick*, 2 Hilt., 514.)

In view of these facts no court would permit either the executor or legatee to recover against Parley.

This being so, there was no debt remaining due from Parley to which the undertaking of Manly could be collateral. If the plaintiff can be said to have anything to do with that debt, he assumed an amount of it equal to his bond and mortgage, and agreed to pay it; such an understanding is in no sense collateral.

The substance and effect of the arrangement was, that Manly promised to cancel and discharge his bond and mortgage in consideration that defendant would discharge the debt due from Parley. This was a sufficient consideration in law to support the promise. (1 *Parsons on Contracts*, 364, 1st edition; *Same*, 369.)

As equity treats as done, that which a party has agreed to do, it will hold the mortgage satisfied and discharged.

The judgment must be reversed and a judgment entered that the bond and mortgage be satisfied and the latter canceled of record, with the costs of the action and of the appeal to the defendant.

Judgment reversed.



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JOHN McCOUN, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

An order denying a motion to dismiss the complaint on the ground that the summons does not contain the proper notice, does not, *it seems*, affect a substantial right, and is, therefore, not appealable to the General Term. (Per MULLIN, J.)

An action to recover a penalty given by statute is an action on contract, within the meaning of section 129 of the Code, and the summons should be in the form prescribed by subdivision 1 of that section.

APPEAL from order denying a motion to set aside the summons and complaint upon the ground stated in the opinion.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The defendant appeals from an order made at the Niagara Special Term, held in January last, denying a motion made by its attorney that the summons and complaint in this action be set aside, with costs. The ground on which the motion was made was, that the action being to recover a penalty given by statute for demanding and receiving illegal fare, the summons should have contained a notice to the defendant that the plaintiff would apply to the court for the relief demanded in the complaint, instead of the notice contained in it that he would take judgment for \$100, besides costs.

It is matter of astonishment to me that a summons was required to contain the notice provided for in the first subdivision of section 129.

The object of its insertion is said to be to relieve the defendant from the trouble and expense of appearing and putting in an answer, being informed of the precise sum demanded of him by the plaintiff.

If the Code had made it certain that the recovery would be limited to the sum mentioned in the summons the object intended would be secured

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But it does not. This protection is only afforded to the defendant when the complaint is sworn to; as it is only in such case that the clerk is required to enter judgment for the sum mentioned in the summons. (Code, § 246.)

When the complaint is not sworn to, the clerk is required to enter judgment for the sum found due on the instrument for the payment of money on which the action is brought, or for such sum as the proofs, on the part of the plaintiff, shall show him entitled to recover.

The complaint need not be served with the summons; and, hence, the defendant is not informed whether it is sworn to, and can only arrive at the justice of plaintiff's claim by its amount, as this is all the information that is furnished him by the summons when that alone is served.

Why, then, are the courts and the members of the bar perplexed by requirements so utterly useless and unmeaning?

The summons performs the same office as the *subpœna* in chancery; it conveys no more information as to the nature of the claim made against the defendant than did the *subpœna*. Why, then, is it not made equally simple and intelligible?

If it is deemed essential that it should inform the defendant of the nature of the claim, or of the cause of action, let it be required, and then every lawyer will be able to insert the information required. But it would be more simple, and yet equally useful, to require the defendant to appear and answer a complaint to be filed against him within a time to be specified, or the plaintiff would apply to the court for the relief demanded in such complaint.

Under the requirements of section 129, as it now is, the defendant must go to the complaint for information as to the nature of the claim. The change proposed subjects him to the performance of the same duty.

Under such a form of summons judgment might be taken on assessment by the clerk in the cases in which he may now assess, and on application to the court when the damages cannot be assessed by the clerk.

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There are a great many cases in which the profession would find no difficulty in determining whether the notice to be inserted in the summons should be the one required by subdivision first of section 129, or under subdivision second of that section.

But there is an incalculable number of cases in which the notice may be under either, without doing violence to the provisions of the section, or in which Omniscience alone can determine under which subdivision the notice must be given.

It is in these doubtful cases that motions like those now before us are made; and they will be made in closely contested cases, or when passion or prejudice is aroused, while the section is permitted to remain as it is.

It is not of the slightest consequence, in ninety-nine cases out of one hundred, under which subdivision of section 129 the notice is given. Yet these motions are contested with as much ardor as if the whole merits of the action were involved.

We cannot change the section, and must deal with it, therefore, as we find it, and, if it is possible to determine whether or not the defendant's motion was or was not rightly decided at the Special Term, affirm or reverse the order.

Before proceeding to consider the question upon the merits of the motion, it is necessary to consider the preliminary objection to entertaining the appeal, that an appeal cannot be taken from the order of the Special Term.

The reason assigned why it is not appealable is that it does not affect a substantial right.

A right is not a substantial one unless the interests of the party would be injuriously affected by the loss of it.

What injury could the defendant sustain by permitting the plaintiff to insert a notice in his summons under the first instead of the second subdivision of section 129 of the Code? I am unable to perceive that it is of the slightest consequence under which subdivision the notice is given.

It is true that a party to an action has the right to require his antagonist to conform his practice to the requirements of the law and the rules of court regulating such practice; and

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if the court fails to compel such party to conform to the practice, he is deprived of a right. But unless the failure to conform to the practice does him some material injury, why should he be permitted to annoy the courts with appeals upon mere technical departures from the rule of practice?

I do not think the order is appealable.

But as the parties have been heard at length upon the merits of the question, we may as well dispose of it on the merits, to the end that the Court of Appeals may finally determine under which subdivision of section 129 the notice required to be inserted in the summons should be given.

To justify the plaintiff in using the form of summons adopted in this case, the action brought against the defendant must be one upon contract, and for the recovery of money only; in which case the plaintiff must state in his summons that he will take judgment for a specified sum, if the defendant fails to answer the complaint.

The defendant insists, first, that the action is not upon contract, but is in tort; and the summons should have contained the notice to the defendant that the plaintiff would apply to the court for the relief demanded in the complaint.

The penalty of fifty dollars imposed by the first section of chapter 185 of the Laws of 1857 upon railroad companies for demanding and receiving a greater rate of fare than is allowed by law for riding on its cars, would seem to be imposed by way of punishment for doing the act prohibited.

A penalty given by statute to the person injured, or to an informer, has been from the introduction of the common law recoverable in an action of debt.

That action lay to recover a sum certain, first, on records; second, on specialties; third, on simple contracts; and, fourth, on statutes, including actions founded on misconduct in office. (Graham's Practice, 2d ed., 84.)

An action of debt lay, in the cases last mentioned, upon the fiction that there was an agreement on the part of the citizen to pay any sum of money directed to be paid by him,

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either by the courts or by the legislature. (3 Blackstone, 161.)

And upon the same fiction the action of debt was held to be *ex contractu*, notwithstanding it was brought to recover a penalty for a positive wrong done to the injured party. (Graham's Practice, 84.)

By the Revised Statutes (3 R. S., 5th ed., 783, § 1) an action of debt or assumpsit might be brought to recover a penalty.

This was the state of the law when the Code was adopted. We are bound to presume that the legislature was cognizant of the different forms of action and of the causes of action recoverable in these various forms.

That an action of debt was embraced in the first subdivision of section 129 seems to me too manifest to admit of argument.

To permit a notice to be given under the first subdivision of section 129, the action must be on contract for the recovery of money only; and the notice must be that the plaintiff will take judgment for a specified sum of money. These are elements of an action of debt, and the last requirement is peculiar to that form of action.

In the summons in this case the defendant is notified that judgment will be taken, in the event he does not appear, for a specified sum of money.

Notwithstanding it is true that the plaintiff may recover more or less than the sum so specified, when the complaint is not verified, the character of the action is not changed. In the early history of the action of debt the plaintiff failed in his action if he failed to prove a right to recover the precise sum stated in his declaration. Yet the courts, at an early day, relieved parties from this strictness of proof and allowed the plaintiff to recover the amount to which he established a right.

If these views are wrong, the notice, where the action is for the penalty under section 39 of the general railroad act, should be under the second subdivision of section 129 of the Code; it follows that when, in the same action, the fare ille-

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gally taken is sought to be recovered back, the summons must contain a notice under both subdivisions.

In the action for illegal fare the notice must be under the first subdivision, as it is on contract and for the recovery of a precise sum of money only.

If the notice must be under subdivision second when a penalty is sought to be recovered, the summons must contain two notices, or there must be two actions.

Section 30 of the general railroad act does not in terms say that the penalty and illegal fare shall be sued for in the same action; but such was, I apprehend, the intention of the legislature, and I am quite sure the absurdity was not contemplated of requiring notice in the summons under both subdivisions of section 129.

If not, then, as the notice might be given properly under both, it may properly be given under either.

I am, therefore, of the opinion that the notice was properly given in the summons under the first subdivision of section 129, and that the order of the Special Term should be affirmed, with ten dollars costs.

Order affirmed.

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STEPHEN D. CORAY, Respondent, v. JOSEPH H. MATTHEWSON,  
Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, MAY, 1872.)

A contract for the sale of real estate provided that the vendor would procure a search of record showing title free of all encumbrances by the day appointed for delivery of the deed. The defendant went into possession under the contract, and afterward an abstract was furnished showing the title to be encumbered by a mortgage. After receipt of the abstract the vendee kept possession of the premises. *Held*, that the vendee might have rescinded upon receipt of the abstract, but in order to do so it was necessary to surrender possession; and that having retained possession and neglected to rescind, he could not avail himself of the breach of the covenant to deliver the search as a defence to an action for specific performance, if the vendor was able at the trial to make such a title as the vendee was entitled to under his contract.

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The court will not compel a purchaser to take a title which is *prima facie*, defective, and which he may not be able to sustain in an action brought to annul it.

Nor is a contract to give a good title *of record* satisfied by a title that can only be established by a resort to evidence *aliunde* the record.

*Held*, accordingly, that a specific performance should not be decreed. It not appearing that the inchoate right of dower of the wife of one of the vendor's predecessors in title had been conveyed to A., under whom the vendor claimed, except by the statement of A. as a witness, that according to the best of her recollection the wife of the vendor's predecessor had joined in the deed to A., such deed being lost and not on record.

*Held*, also, that the fact of the vendee's having gone into possession under the contract, it not appearing whether before or after the discovery of the defect in the title, and having remained in possession and not rescinded after discovery of the defect, did not amount to a waiver by the vendee of the right to object on account of it.

A recital in a mortgage that the premises are the same this day conveyed by the mortgagee to the mortgagor estops the mortgagee, *it seems*, and his heirs from denying the conveyance of the premises.

On the 18th of March, 1870, the plaintiff and defendant entered into a contract, under their hands and seals, whereby the plaintiff covenanted and agreed to and with the defendant to sell and convey to him certain lands in the town of Almond, in the county of Allegany, containing about 315 acres of land, and to procure a search of record showing title free of all encumbrances by the 1st of May then next; and upon performance of the conditions in said contract to be performed by the defendant, he would convey said premises to him by a full covenant warrantee deed on said first day of May.

The defendant on his part covenanted and agreed to and with the said plaintiff to pay for said land the sum of \$6,000 in eight equal annual payments, the first to be made on the 1st of April, 1871, and the remaining payments annually thereafter. He was also to pay all taxes and assessments thereafter imposed upon said land.

It was mutually agreed that the defendant should have possession on the 1st of April, 1870, and that he should keep the same in good repair, &c. That if defendant should fail to perform said contract the plaintiff might declare it void, retain

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whatever might be paid upon it and all improvements, and might consider defendant as his tenant, holding over without permission, and take immediate possession and remove defendant therefrom.

On or about the 1st of May, 1870, the defendant went into possession of said premises, and was in possession thereof at the time of the trial of this cause.

About the 17th of October, 1870, the plaintiff presented to the defendant a search made by the clerk of Allegany county, by which it appeared that the premises in question were conveyed by Masterton, Ure and others to Paul Goddard by deed dated the 1st of July, 1847, and which was duly recorded 9th of January, 1852, in *liber* 34 of deeds, page 201, &c., in the clerk's office of said county.

In April, 1859, Paul Goddard and wife conveyed same premises to Edward J. Opp, which deed was duly recorded.

In March, 1860, Opp and wife conveyed to Charles L. Flint. This deed was duly recorded.

No deed is found upon record from Flint to any person; but there is found a mortgage from Sarah Arndt and her husband to said Flint upon the said premises, the consideration of which is stated to be \$5,000. It is dated March 28th, 1861, and was duly recorded May 17th, 1861, in *liber* 23 of mortgages, page 172. It is stated in the mortgage that "the lands in this instrument described, being the same conveyed by said party of the second part to said Sarah Arndt by deed bearing even date herewith."

The search showed a mortgage given by the plaintiff and wife to Jesse B. Gibbs, bearing date January 21st, 1869, recorded January 27th, 1869, in *liber* 32 of mortgages, which was a subsisting lien on said premises.

This search was left with defendant for some time for the purpose of examination by counsel. It was finally returned with an objection to the title on account of the absence of evidence of any conveyance to Arndt, and also because of the last mentioned mortgage.

Plaintiff procured a satisfaction-piece of said mortgage and



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annexed it to the search and left it with one Brown, giving defendant notice that he could examine it while in Brown's possession, but he could not take it away.

Before the commencement of this action plaintiff prepared and tendered a deed of said premises to the defendant, which he refused to accept and perform the contract on his part; and on the 20th of December, 1870, this action was commenced to compel the defendant to specifically perform said agreement, or to surrender possession and account for the rents and profits.

On the trial it was proved, on the part of the plaintiff, that the several grantees, named in the deeds mentioned in the search, entered and occupied under them from 1847 down. That as early as April or May, 1870, the defendant knew that the deed from Flint to Arndt was not recorded.

Mrs. Arndt was sworn and testified that she had seen the deed from Flint to her, that it was burned up some three to five years after she gave the mortgage. It was acknowledged, and was from Flint to her. She did not recollect whether Flint's wife signed the deed; the best of her recollection was she did.

The court below ordered judgment that the defendant specifically perform the contract on his part, and from that judgment defendant appeals.

*Hakes & Stevens*, for the respondent.

*Bemis & Near*, for the appellant.

Present—MULLIN, P. J.; JOHNSON and TALCOTT, JJ.

MULLIN, P. J. Upon the failure of the plaintiff to deliver a search, showing his title to the land free from encumbrance, the defendant might have rescinded the contract. In order to rescind, he must have surrendered the possession. (*More v. Smedburgh*, 8 Paige, 600.)

Neglecting to rescind and yet retaining the possession, he

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cannot be permitted to insist upon the plaintiff's breach of the covenant to deliver the search as a defence to his action for specific performance, if the plaintiff was able at the trial to make such a title to the premises as the defendant is entitled to receive under the contract. (1 Hilliard on Vendors, 193, 321; 2 id., 279.) Nor could a purchaser, retaining possession, successfully resist the payment of the purchase-money. (*Wright v. Delafield*, 23 Barb., 493.)

Before proceeding to inquire whether the plaintiff has shown such a title as the defendant is, under the circumstances of the case, bound to receive, it is necessary to ascertain what sort of title the defendant is entitled to under his contract, and to what extent, if any, the contract has been controlled or modified by the acts of the parties under it.

The search which plaintiff was to furnish was required to show that the plaintiff's title was free from all encumbrance.

The parties must have intended by this provision that the title should be free from all encumbrance, as the search could not truthfully show the title unencumbered if it was not so in fact.

The conveyance which plaintiff was, by his covenant, to execute and deliver to the defendant was *a full covenant warranty deed*. One of the covenants in such a deed is that the premises conveyed are free from encumbrances.

When the contract between the parties is to sell land, and there is no specification of the extent or nature of the title that is to be conveyed, the vendor must convey a good unencumbered title. (1 Hilliard on Vendors, 208, 209.) So a covenant to give a good and sufficient deed of conveyance, free of all encumbrances, binds the party to give a deed which passes the title. If the vendor cannot make such a title, the purchaser may recover back the purchase-money with interest. (1 Hilliard, 209.)

The same author says, on page 210, that when one contracts to purchase, on the faith of the vendor's having a good title, he has a right to have the title sifted to the bottom before he can be called on either to accept an indemnity or

compensation for a defect, or to abandon the contract, as equity will not compel a purchaser to take a doubtful title.

In Fry on Specific Performance (347), it is said, "When the vendor sues the purchaser for a specific performance of the contract, the defendant is entitled to have the plaintiff's bill dismissed, if it appears that the plaintiff cannot make out to the land a title free from reasonable doubt." (See also note [1] to same page; also note [2], page 349.)

At page 350, the same author says, "The court will never compel a purchaser to take a title when the point on which it depends is too doubtful to be settled without litigation, or when the purchase would expose him to such proceedings. The court will not compel him to buy a lawsuit."

Let us now inquire whether the title established by the plaintiff from the record by the recitals in the conveyances under which he acquired title, and by the parol proof given on the trial, has established such a title as the court should require the defendant to accept.

The defect in the title being the absence of a deed from Flint to Arndt, the failure to record that deed would be obviated, if its existence is legally proved, as, if shown to exist, it could be recorded, and thus the title of the plaintiff made complete on the record.

The defendant is by his contract entitled to a title of record, and if the evidence falls short of establishing such a title, the plaintiff is not bound to accept it, unless he has estopped himself from insisting on such a title.

Every person who has had anything to do with conveyancing must be aware of the importance to persons desiring to sell land, to be able to show a perfect title of record; such a title is not only the most satisfactory, but to those not acquainted with the law, the only one they will or can safely receive.

A title is very largely depreciated that can only be established by a resort to evidence *aliunde* the record.

The provision in the contract, for a perfect title on the

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record, was a very important one to the defendant, and the court cannot altogether disregard it.

The law furnishes no means to establish the execution or contents of the deed from Flint to Arndt, except by perpetuating the evidence of the parties to that deed, to be used whenever litigation arises. A suit by the defendant may be indispensable. Even a suit will not perfect his title on the record.

The court below has held that conveyance to Mrs. Arndt was established conclusively by the evidence of Mrs. Arndt alone, while for aught appearing in the case, the rights of third persons may have intervened, and which may at some future day be asserted to the premises.

It is enough that there is nothing shown in this case, that the title in Mrs. Arndt was a legal unencumbered title.

It was proved that Flint had a wife, and the only evidence that she united in the deed is the uncertain and unreliable recollection of Mrs. A. as to an event occurring more than ten years before the trial. What was to prevent Mrs. Flint from asserting, should she survive her husband, her right of dower in said premises?

The court will not compel the defendant to take a title which is *prima facie* defective, and which he may not be able to sustain in an action brought to annul it.

It was held, in *Seymour v. Delancey* (Hopk., 436), that equity could not compel a purchaser to take a doubtful title. But the purchaser will not be relieved when there is only a bare possibility that the title may be affected by existing causes, provided the highest evidence of which the nature of the case admits, and amounting to a moral certainty, be given that no such causes exist. (*Schermerhorn v. Niblo*, 2 Bos., 161; *Miller v. Macomb*, 26 W., 229.) What protection would defendant have against Mrs. Flint, should she sue for dower? The judgment on this case would be of no avail against her; she is not a party to it, and yet the recollection of Mrs. A., that Mrs. Flint was a party to the deed to her, has been held sufficient evidence of a transfer of her title to bind her.

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If such was not the effect of the evidence and of the judgment founded on it, the defect in the title remains.

Mrs. F. was not a party to the foreclosure of the mortgage given to Flint by Mrs. A., and she is not bound by the judgment in that action.

The recital in Mrs. A.'s mortgage of the conveyance by Flint to her may bind Flint. He is bound also by the judgment of foreclosure of that mortgage. But the difficulty as to his wife's title is not obviated by either.

The defendant ought not to be compelled to accept such a title.

It only remains to inquire whether taking and retaining possession by the defendant estops him from disputing the plaintiff's title.

It has been repeatedly said that a purchaser who takes and retains possession of lands under a contract of purchase is estopped from alleging a defect in the vendor's title. (1 Hilliard on Vendors, 21, 223; *Viele v. Troy, etc., R. R. Co.*, 20 N. Y., 184.)

But the proposition thus broadly stated is not supported by any adjudged case that I have been able to find.

Possession will estop a purchaser from taking advantage of the strict performance by the vendor of his covenant to convey at the time specified in the contract, and from successfully resisting the payment of the purchase-money. (*Wright v. Delafield, supra*; 1 Hilliard on Vendors, 221; *Viele v. Troy, etc., R. R. Co, supra*; *Tompkins v. Hyatt*, 28 N. Y., 347; *Hill v. Hill*, 4 Barb., 419; *Lewis v. McMillen*, 41 Barb., 420.)

And when he enters into possession under the contract, knowing there is a slight defect in the vendor's title or a slight encumbrance upon it, he will be held to have waived it. 1 Hilliard, 223, 224; *Ten Broeck v. Livingston*, 1 J. C. R., 357; *Winne v. Reynolds*, 6 Paige, 407.)

But when the defect in the title is such as necessarily to lessen the value of the property, it will not be held waived except upon the most conclusive evidence that it was his intention so to do.

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This is the conclusion necessarily drawn from the opinion of the Master of the Rolls in *King v. King* (1 Mylne & Keen, 442).

The defendant, the purchaser, had been in possession for eight years, under a contract for the purchase of certain premises, to which the vendor could not make a good title, yet he had refused to surrender possession or to take such title as the vendor could give. The bill was filed by the latter to compel a surrender of contract or that defendant accept the title.

The Master of the Rolls directed the surrender of the agreement and an account for the rents and profits.

This case is substantially the same in principle as the one before us. Yet eight years' possession did not estop the defendant from insisting on the defect of title, and the relief granted fully protected the vendor and did no injustice to the purchaser.

In *Burroughs v. Oakley* (3 Swanst., 159) a purchaser was held entitled to an investigation of the title, notwithstanding possession taken, acts of ownership incident to possession, and preparation for a conveyance. (1 Hilliard on Vend., 227, 228.)

In *Minor v. Edwards* (12 Miss., 137) the agreement was to pay for the land, on the vendor making a clear title in fee simple. The deed delivered did convey in fee, but there was an encumbrance unknown to the purchaser. Held, the latter might waive his right to a deed in fee and accept a lesser interest; that whether there was such a waiver was a question for the court, and there must be unequivocal proof of it.

The most that can be claimed against a purchaser, by reason of taking and retaining possession of land under a contract of purchase, is that it is evidence of a waiver of objection to the title, but whether it shall estop him depends on the circumstances of the case.

In *Fox v. Burch* (1 Merivale, 105) the defendant went into possession of premises to which the vendor covenanted to make title by a day named and on the payment of the price to convey; the abstract showed a valid title. The bill prayed

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specific performance or that defendant surrender possession and account for the rents, &c.

The answer admitted the agreement, claimed possession under a prior parol agreement, and that he took exceptions to title as disclosed in the abstract, and they had not been removed, and that he insisted on a performance by the plaintiff.

The Lord Chancellor said that although, in the ordinary case of a purchaser being let into possession, he must be taken to have waived or to have given reason to expect that he will waive objections to the title, yet there is another class of cases in which the purchaser gets into possession by the courtesy of the vendor, when it must depend on the particular circumstances of each case whether he shall be compelled to pay the purchase-money before the completion of the title. In the present case, it was not denied there was a degree of laches on the part of the vendor in making out his title, and on these grounds the motion was denied, and an order of reference ordered to inquire as to the title.

The court finds that the defendant knew as early as May or April of the defect in plaintiff's title.

This defect was not discovered until after the contract was completed by which the rights of the parties were fixed. It cannot be said that defendant purchased with knowledge of the defect, and he is not estopped on that ground from insisting on the defect.

It is not certain whether defendant went into possession with knowledge of the defect in the title. By the contract he was to have possession on the 1st April, 1870, but the finding is he entered on or about the 1st May, and that he had notice of the defect in April or May.

This finding is too uncertain to justify the court in giving any considerable importance to the notice.

Should the defendant succeed on the next trial of this cause, the judgment should contain a provision declaring the contract between the parties null and void, thus enabling the plaintiff to maintain ejectment for the land, and in such action

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to recover the rents and profits for the time defendant has been in possession.

For these reasons, I am of opinion that the judgment of the Special Term should be reversed and a new trial granted, costs to abide the event.

JOHNSON, J., dissented.

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WILFORD S. PETRIE, by Special Guardian, Respondent, v.  
MOSES PETRIE, Surviving Executor, &c., et al., Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1872.)

In an action to compel an accounting, all persons interested in obtaining the account must be made parties.

The rule applies, it seems, in an action to compel the accounting of an executor, to legatees who, in receipting for legacies, have given agreements to refund, and in an action for an accounting by trustees, to the personal representatives of a deceased co-trustee; especially if not conceded that no part of the trust estate was received by the deceased trustee. And where such fact is conceded, *quere*.

Where there are no representatives of the trustee appointed, they should be appointed before suit, and made parties.

Persons entitled under a will to allowance out of the income of the testator's estate for their education, are necessary parties to the accounting of an executor.

Where the will directs the executors and trustees to apply, out of the general income of the estate, a sufficient sum to educate certain minors so long as industrious, &c., and until a certain age, the trustees should determine what sum they will pay annually; and invest a principal sum, out of the estate, sufficient to yield such sum at interest, after satisfying commissions, debts and funeral expenses.

A legacy for education, like one for maintenance, is to be preferred to general legacies; and in case of doubt as to a sufficiency of assets to provide for such legacy, the legatee has a right to an accounting and to compel the investment of a sufficient sum to answer the purposes of the bequest.

The assets of an estate can only be recovered by the personal representative of the deceased; a legatee under a will, as such, has no power to collect assets of the estate from a deceased executor's representatives, nor to restrain the executor, when solvent, from applying the funds of the estate to fictitious or outlawed claims.

One claiming to restrain an executor from making such payments must show the executor's insolvency; his ignorance on the subject will not throw the *onus* on the executor.



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THIS was an appeal from an order overruling a demurrer to a complaint.

The complaint averred that on or about the 15th of September, 1859, David Petrie, of Little Falls, in the county of Herkimer, departed this life leaving a last will, in and by which he appointed his brothers, Moses and Joram Petrie, and his nephew, Jost D. Petrie, executors and trustees, and devised all his estate, real and personal, not therein specifically given and disposed of, to his said executors in trust.

1st. To pay debts and personal expenses, to erect and maintain a monument to his deceased wife in his burial lot in the cemetery, and to keep the lot in order; and at the expiration of said trust he gave \$400 to the trustees of the village of Little Falls to take care of and keep in order such monument and grounds.

2d. He directed his executors and trustees to apply, out of the annual income of his property, a sufficient sum to liberally educate Charles Petrie and the plaintiff, to commence when said boys attained the age of thirteen years, and to continue so long as they were diligent students of sober, temperate habits and of good morals and behavior, and until each should attain the age of twenty-three years. The executors were also required to apply fifty dollars out of the yearly income to the education and support of James H. and Caroline Bowen, to commence when said James H. should attain the age of thirteen, and continue until he became eighteen years of age, and while he was studious and of good morals, &c.

That the executors were also required to pay, out of the annual income, the school bills of the children of Elizabeth Staring.

That he next gave pecuniary legacies to some twenty persons, amounting in the aggregate to several thousand dollars.

That he also gave to his sister, Mary Petrie, during her natural life, or so long as she should bear her then present name, the entire use of his homestead, together with furniture, &c., and it was his wish that his brother, Moses, should live with her. At her death he gave said property to his

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nephew, Charles L., for life, provided he occupied the same; and at his death to his oldest male child in fee; and if he should die without male issue, then to the oldest son of his brother.

That the executors were required to pay certain sums annually for various lengths of time for the support of the clergymen of certain religious denominations, and fifty dollars per year for ten years for the education of poor children in the village of Little Falls, to be designated by said executors.

That the residue of his estate, after paying legacies, &c., was to be paid one-half to Joram Petrie or his heirs, and the other half to be divided amongst his nephews, Philo, Henry and Jost D. Petrie and their heirs.

That it was further provided that said trusts were to continue in force during the joint and several lives of his nephews, Charles and Philo; and on the death of the survivor he gave the trust estate, one-half, to Joram Petrie. If he should then be dead, to his heirs; and if none, then to the son's children or the descendants of Isaac Petrie. The other half to the children, &c., of said Isaac.

That the trustees were authorized to dispose of his estate at private sale.

That the will was duly proved, and the executors took on themselves the duties of said trust.

That on or about the twenty-first of August, 1865, Jost D. Petrie, one of said executors, and the father of the plaintiff, died, leaving the other two trustees surviving him.

That on the sixteenth of October, 1869, Joram Petrie, another of said executors, died intestate, leaving Moses the only surviving trustee.

That Fanny P. Cottle and Charles L. Petrie were duly appointed administrators of his said estate.

That the plaintiff and Charles L. Petrie are each more than thirteen years of age.

That at the death of the testator, David Petrie, he was possessed of a considerable personal property, most of which

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passed into the hands of Joram, but a part into the hands of Moses.

That David died seized of sundry parcels of real estate, all of which, except a farm of 129 acres, was free from encumbrance; the farm was under a mortgage for \$3,000, executed since the death of said David. The money was raised for the benefit of Joram, one of the executors. Moses, the other executor, knew of said mortgage and the purpose for which it was made, and yet suffered it to remain a lien on said farm for several years prior to the death of said Joram.

That Moses Petrie is an old man, unacquainted with accounts, and wholly unfit to act as trustee in the keeping of accounts. Houses on the land, left by the testator, were permitted to remain unoccupied.

That the farm worth \$3,000 is rented for five years, for \$160 per year. The village property is so managed that Moses claims he receives but \$600 therefor annually. Debts due from the estate are left unpaid. Moses has received moneys belonging to the estate, the amount of which is unknown to the plaintiff.

That the plaintiff alleges that the bequest to the village of Little Falls is void, and, if not paid, should be so declared.

He further alleges that he is informed and believes that he is entitled to have it ascertained what the annual income of the estate is, after the payment of the debts of said estate, and a sum sufficient to educate him and Charles L. be set aside for that purpose.

That legacies to sixteen of the legatees have been paid and also the amount directed to be paid to the several clergymen.

It is alleged that the bequest for the education of poor children is void.

That the representatives of Joram Petrie claim that there is due from the estate of David sundry demands which are either unfounded or outlawed.

That Moses and Joram Petrie had received divers sums of money, as executors of David, for which moneys the representatives of Joram ought to account.

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The complaint then demands as relief:

1st. An accounting.

2d. That provision in the will providing that fifty dollars, for ten years, be applied to the education of poor children, be declared void.

3d. That the legacy to the village of Little Falls, if not paid, be declared void.

4th. That the rights of the plaintiff and Charles L. Petrie to an education out of the estate of the testator be established and determined, and the duty of the executors in reference thereto be also determined.

5th. That the executors be restrained from paying out of, or in any manner charging, the estate of said David Petrie with the debts formerly held by said Moses Petrie, except as the court may order.

To this complaint, of which the above is an abstract, the defendant, Fannie Cottle, individually and as administratrix of Joram Petrie and Moses Petrie, demurs on the following grounds:

1. Defect of parties plaintiff.
2. Defect of parties defendant.
3. Several causes of action have been improperly joined.
4. Plaintiff has no legal capacity to sue.
5. The complaint does not state facts sufficient to constitute a cause of action.

Fannie Cottle individually demurs to the complaint on the further ground that the facts alleged in the complaint, except so much as charges the bequest to the village of Little Falls void, and that if paid the executors who paid it should account for it, and that the plaintiff is entitled to have the amount of the income of the estate ascertained, and a sufficient amount set apart to educate him and the said Charles, do not constitute a cause of action.

The demurrers were overruled and leave given to defendants to answer on payment of costs. From this order the defendants appeal.

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*F. P. Sizer* and *O. O. Cottle*, for the appellants.

*Charles G. Burrows*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. By the will the real and personal property of the testator were conveyed to the executors in trust to pay debts and legacies. They are to be treated, therefore, as trustees, and as such they are to account in equity for the property so conveyed to them in trust. Part of the relief sought by the plaintiff is an accounting by the trustees; but to an action to compel an accounting all persons interested in obtaining an accounting must be made parties.

Story, in his work on Equity Pl., § 219, says: "Whenever different persons are interested in an account, though not in the same right, they should all be joined, as for instance heirs and personal representatives, residuary legatees and distributees, mortgagors and mortgagees, and their assignees. (*Sortore v. Scott*, decided in this department in March last.\*)"

If the legatees whose legacies under the will have been paid gave to the executors agreements to refund, as they (the executors) had the right to require the legatees to give, they are still interested in the estate, and entitled to be heard on the accounting. But if no such agreement to refund was given, there are still several persons interested in the accounting who are not made parties.

To an action for an accounting by trustees the personal representatives of a deceased trustee are necessary parties, unless it is conceded that no part of the estate came into his hands. Even then, the protection of his estate would seem to require that his representatives be made parties. (*King v. Talbot*, 40 N. Y., 76; *Sortore v. Scott*, *supra*.)

Whether there are any personal representatives of Jost D. Petrie, a deceased trustee, does not appear; but if there are

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\* Reported 6 Lans., 271.

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none, representatives should be appointed and made parties. His heirs-at-law do not represent him for the purposes of stating an account of the trust estate.

James Bowen, who is entitled to an allowance out of the income of the testator's estate toward his education, and the children of Elizabeth Staring, toward whose education money is to be paid annually, are all necessary parties to the accounting.

It is unnecessary to name all the persons who should be, but who are not, made parties. It is sufficient to say that all should be made parties who have an interest in the estate; and the complaint is defective so long as any such persons are omitted.

It was the duty of the trustees to determine what sum they would pay annually to the plaintiff and Charles L. Petrie toward their education, and out of the property of the estate to invest on interest such a sum, as principal, as that the interest would raise the sum decided to be necessary for their education. (*King v. Talbott, supra.*)

This could be done only in the contingency that the assets in the hands of the trustees were sufficient to pay the commissions of the trustees, funeral expenses and the debts of the estate.

After these were satisfied, then the plaintiff and Charles were entitled to have enough of the remainder of the estate invested to produce the amount to which they were entitled.

The will directs the amount which is to be applied to the education of Charles D. and the plaintiff, to be paid from the income of the estate. If this provision is construed strictly, it might preclude such an appropriation and investment as is suggested above, and compel the trustees to keep the income together, and out of it to pay the legacies. But such a construction might result in depriving the plaintiff and Charles of the sum deemed necessary, for a part or all of the time, should the assets prove insufficient to pay the debts and legacies.

It would, therefore, seem to me the preferable mode in

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which to give effect to the intention of the testator to set apart a sum which would yield as interest annually the amount required.

A legacy for education, like one for maintenance, must be paid in preference to the general legacies given by the will, if the assets are sufficient for the purpose.

If, therefore, there is any doubt as to the sufficiency of the assets to pay all the debts and legacies, the plaintiff has the right to require the trustees to account, and to compel them to invest sufficient to yield as interest the amount deemed sufficient by the trustees to educate him.

To arrive at the condition of the estate, it is indispensable that the validity of the bequests be determined; hence, the necessity of asking in this action a determination of the validity of the bequest to the village of Little Falls, and for the education of poor children.

A cause of action against the representatives of Joram Petrie to collect assets which may have come to his hands cannot be joined with either of those above mentioned for two reasons.

1st. Because the plaintiff cannot maintain an action to recover assets. Such an action can only be maintained by the personal representatives of the latter.

2d. Because it is a cause of action separate and distinct from that for an accounting or to determine the validity of the legacies, and does not arise out of the same transaction within the meaning of the Code.

If the surviving trustee was insolvent (which is not charged) the plaintiff might maintain an action to restrain him from applying the funds of the estate to the payment of fictitious or outlawed debts, or committing any other breach of trust. When, however, the executor is solvent he may pay such debts as he pleases; but if he pays debts not legally chargeable to the estate he does so in his own wrong, and the payment will be disallowed in the settlement of his account.

The plaintiff says that he does not know that Moses Petrie is solvent; he should know that he is not before he can

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require the court to assume to control his action as trustee, or to remove him from the trust.

Other insurmountable difficulties in maintaining the action, as it is set out in the complaint, lie in plaintiff's way; but it is unnecessary to refer to them more particularly, as the difficulties already suggested will enable the pleader to prepare a complaint that will obviate them.

The order of the Special Term must be reversed, and leave given to the plaintiff to amend his complaint on payment of costs of the demurrer and of this appeal. If he does not amend, then judgment is ordered in favor of the defendants on the demurrer, with costs.

Judgment accordingly.

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MARGARET GRISWOLD, Respondent, v. ALEXANDER G. PERRY  
et al., Overseers of the Poor, &c., Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1872.)

A purchaser of land from a trustee with power to convey only on the happening of an event, which is a condition precedent, must ascertain at his peril whether the condition has been fulfilled. And this is so, even although the deed recites performance of the condition.

It is otherwise, under a condition subsequent, under 1 R. S., 730, § 66.

Accordingly, where trustees had power to sell only in case there should be a deficiency of income for certain purposes, and conveyed, reciting the condition and a deficiency under it,—*Held*, that their conveyance was void, it appearing there was in fact no such deficiency.

To justify a sale the trustees should state an account and show a deficiency in point of fact. An offer to show payments of portions of the income, without going this length, is insufficient.

Trustees should proceed for settlement of their accounts against the *cestui que trust* before assuming to act on a fulfillment of the condition.

THIS was an appeal by the defendants from a judgment entered on the referee's report, in the plaintiff's favor. The facts, as they appeared, were these, viz.:

On the 13th August, 1854, John Eastland, of Bethany, in the county of Genesee, departed this life, leaving a last will,



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in and by which he gave and devised to his daughters Elizabeth and Nancy, both of whom were *non compos mentis*, the income of a farm of land situate in said town, containing 105 acres, except so much (so it was provided) as should be necessary for his (the testator's) support and maintenance during his natural life, the income to be theirs during their natural lives, and, after deducting sufficient for his support, to be applied by his executors for the support of Elizabeth and Nancy in the following manner, viz.: the executors were authorized and required to give the whole remaining income of the piece of land to such person or persons as should faithfully take care of and provide for Elizabeth and Nancy, and so long as they should do so. The executors were also authorized to see that proper care should be taken of the piece of land, and, if the remaining income thereof should be insufficient for the support of Elizabeth and Nancy, after deducting for testator's support, to sell at private sale so much of the land as they should deem necessary for the support of Elizabeth and Nancy. At the decease of Elizabeth and Nancy the testator directed that the farm, or so much of it as should remain after the support of himself and of his daughters Elizabeth and Nancy, should be equally and equitably divided by his executors between those persons who should have faithfully taken care of and supported Elizabeth and Nancy and himself, from and after the 1st April, 1850, in proportion to the time that each person should have so done. The testator's daughter Margaret was to share in the division of the farm, for one year from the 1st April, 1850, and for all the time that she had taken care of Elizabeth and Nancy and himself, and for all the time that she should take care of them. The testator defined "supporting" to be an application of the farm for the purpose of support.

By a subsequent clause of the will it was provided that the testator's daughter, Margaret, should have a home in the dwelling-house on the farm, as long as she should remain unmarried, but should support herself.

Robert Eastland and A. W. Page were appointed executors

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of the will. The will was duly proved before the surrogate of Genesee county. Letters testamentary were duly issued to them, and they entered upon their duties as executors.

Nancy Eastland died on the 6th October, 1855, Elizabeth on the 28th June, 1870. Margaret Griswold and Jane Lincoln supported the testator and Elizabeth and Nancy. Joseph Eastland also supported them. Robert Eastland, John E. Chittenden, Joseph Eastland, Polly Chittenden and Mary Jane Chittenden supported Elizabeth for several periods of time mentioned in the report of the referee. On the 24th March, 1858, the executors of John Eastland sold and conveyed thirteen acres of the land above mentioned to Robert Young. In the deed the provisions of the will respecting the disposition of the farm of 105 acres were recited, and also that the income of the premises were insufficient for the support of Elizabeth and Nancy, the testator's daughters, and that the grantors therefore deemed it necessary, pursuant to the authority contained in the will, to sell a part of the premises, and that they therefore, in pursuance of such power and in consideration of \$336.55, sold and conveyed the premises described, and the deed contained a covenant of warranty.

Robert Young, the grantee above named, died in 1858, leaving a will appointing Sally Young his executrix. In 1859 she conveyed thirteen acres to Joseph Eastland, and in 1864 the latter conveyed the same to the defendants, Perry, Brown and Griswold, overseers of the poor of the county of Genesee, who entered into possession under their deed and claimed the premises by virtue thereof.

John Eastland, the testator, left several sons and daughters besides Elizabeth and Nancy above named. The plaintiff, Margaret Griswold, is one of the testator's daughters who is named in said will, and who supported for for a time the testator and Elizabeth and Nancy under the will. She brought this action to set aside the conveyance of the thirteen acres by the executors of her father to Young and the subsequent conveyances of the same premises, as being given in violation of the powers conferred by the will of her

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father, the income of the 105 acres being at all times more than enough to support the testator and his daughters Nancy and Elizabeth. The plaintiff insisted that the whole of the 105 acres belonged, by virtue of the will of her father, in certain proportions, to those who supported the testator and his two daughters, in proportion to the length of time each rendered such support, and that she, as one of the persons, was entitled to an undivided seventh part of the 105 acres. She demanded judgment, that the deed from the executors of her father for the thirteen acres be declared void. If that relief was not granted, she then asked that the surviving executor of her father's will should divide the residue of the 105 acres between her and Jane Lincoln as follows: Four-fifths to plaintiff, and one-fifth to Jane. And if it should be held that the land passed to the heirs of John Eastland, deceased, as if no will had been made, that then the same be apportioned amongst the heirs, or that the land should be sold and the proceeds divided. The overseers of the poor answered, insisting on the validity of the conveyance to them.

On the trial, the will of John Eastland was put in evidence, and the length of time the several persons who had supported the testator, and his daughters Elizabeth and Nancy, was proved.

It was conceded that the income of the farm was sufficient to support those persons during and throughout their lives. The conveyances from the executors to Young, and from his executrix to Joseph Eastland, and from him to the overseers were also proved.

The defendants offered to prove that, prior to a final settlement, the executors had incurred costs in defending an action brought by one Lincoln, as assignee of Margaret Eastland, to the amount of \$222.80; which sum the surrogate had refused to allow the executors on their final accounting before him. The plaintiff's counsel objected to the evidence and it was rejected by the referee.

The defendants also offered to prove that the Lincoln suit was brought to recover for wheat sown on the farm mentioned

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in the will after the death of the testator, together with other property, and a part of the recovery was for the wheat sown after the death of the testator. The plaintiff's counsel objected to the evidence, and it was rejected by the referee.

The defendants also offered to prove that one Scoins had sued the executors to recover for wheat sown after the testator's death, and that the executors defended the action and paid out therefor sixty-three dollars. The evidence was objected to by plaintiff's counsel and rejected by the referee.

The defendants offered to prove the items of their account, and that the suits had been defended in good faith. The evidence was objected to by the plaintiff's counsel and rejected by the referee.

The referee ruled and decided that the costs and disbursements incurred by the executors in the administration of the estate, prior to the final decree of the surrogate, should be excluded, and that such costs and disbursements by the executors, after such final decree, might be given in evidence; to which ruling and decision defendants' counsel excepted.

The surrogate, upon the presentation of the account of the executors, and a final accounting asked for, had referred it to an auditor to take proofs and report what part thereof should be allowed, and what part, if any, disallowed; who reported, amongst other things, that two-thirds of the amount paid by the executors for costs and expenses in the suits above mentioned should be allowed to them. But the surrogate refused to confirm that part of the report, and disallowed such item without prejudice to the right of the executors to present said claim on the final settlement of their account for expenses incurred in the care and management of the real estate.

The referee found the facts aforesaid, with others not necessary to a decision of the questions presented by this appeal. He also found that there were no liens on the premises mentioned in the will; that they were incapable of partition, and were worth \$5,000. He decided as matter of law that the will of the testator was valid; that the executors

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took a fee in said lands by implication; that on the death of Elizabeth the survivor of the two daughters, who were *non compos mentis*, the fee descended to the persons who had supported the testator and his daughters, in certain proportions stated by him, as remainder-men and tenants in common; that on the death of said Elizabeth the estate the executors had in said land terminated, and an estate in fee vested in the remainder-men above named; that the conveyance by the executors of the thirteen acres, above mentioned, was inoperative and void and vested no estate in the grantee, and that the overseers of the poor had no title to nor interest in said premises. He ordered judgment, that said premises be sold and the proceeds, after paying costs, &c., divided amongst the remainder-men in the proportions specified in said judgment.

The overseers excepted to the conclusions of law contained in the report of the referee, and they alone appeal.

*A. P. Laning*, for the appellant.

*Peck & Bowen*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. It is not necessary for us to determine whether the executors of the will of John Eastland took a fee by implication under said will in the land devised thereby, or whether they were clothed with a mere power in trust to sell said lands in the event the income therefrom was not sufficient to support the testator and his daughters, Elizabeth and Nancy, as in either case they had power to sell any part of the land described in the will only in the event the income proved insufficient for the support of said persons.

There is great hardship in requiring a *bona fide* purchaser for value, in order to establish a valid title to land purchased of a trustee who is authorized to convey, on the happening of some future event, to prove that such event had occurred

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when its occurrence is asserted by the trustee, who alone can know whether it has or has not in fact occurred. But the point seems to be too well and too long established to be considered open to discussion.

In *Hill on Trustees*, 478, it is said a power of sale, like all other powers, can be exercised only in the mode and subject to the conditions, if any, prescribed by the instrument creating the power. Therefore, when the trust is to sell after the death of the tenant for life, a sale in his lifetime will be bad, even though made under a decree of the court. Upon the same principle, when the power of sale is to be exercised only on some conditional event, such as the deficiency of another estate to answer certain charges, or upon the purchase and settlement of another estate to the same uses, the power cannot be exercised without the literal performance of these conditions.

As regards purchasers from trustees, under powers of this description, there is a material difference whether the conditions annexed to the exercise of the power is precedent or subsequent. If precedent, its performance is essential for giving existence to the power of sale, and no sale under the power can by possibility be maintained, unless the condition be performed. But when the condition is subsequent, the power of sale will attach independently of the performance of the condition. This distinction between *conditions precedent* and *subsequent* is recognized in *Tiffany & Bullard on Trustees*, 767.

In *Richardson v. Sharps* (29 Barb., 222) a sale by executors of real estate was held void, made eight years after the testator's death, that the will required to be sold within seven years after that event.

In *Briggs v. Davis* (20 N. Y., 15), fifteen trustees, holding lands in trust for creditors, reconveyed them to the grantor by deed, which recited that the trust had been executed, when, in fact, there were *cestuis que trust* entitled to a sale and distribution of the proceeds, and the debtor, after such conveyance, mortgaged the same to one having constructive but not

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actual notice of the trust and reconveyance, it was held that the mortgagee took subject to the trust. It was said that the purchaser takes no benefit from the recitals in the deed to him that the debts had been paid, but he must ascertain, at his peril, that such is the fact. The reconveyance being in contravention of the trust is absolutely void, and the legal estate remained in the trustees. (See, also, *Allen v. De Witt*, 3 Coms., 276; *Cleveland v. Boerum*, 27 Barb., 252; *Roseboom v. Mosher*, 2 Den., 61; *Barber v. Cary*, 11 N. Y., 397.)

When the condition is subsequent, such as the application of the proceeds of the sale of land to the payment of debts, the purchaser is by section 85 of 3 R. S., 5th ed., p. 22, relieved from any obligation to see to the application of the proceeds to such use; and in other cases he is not responsible for the misconduct of the trustee, unless he is colluding with him to defraud the person entitled to the benefit of the proceeds or some part thereof.

The condition in this case was a condition precedent; and if the cases cited are law, the sale by the executors, under which the overseers claim, is utterly void. The evidence offered by the defendants was properly rejected.

By the will the whole income of the farm was required to be applied to the support of three of the persons entitled to be supported under the will.

If it was sufficient for the support of three of them, it was surely sufficient for the support of one of them, with a surplus over. From this surplus charges for taking care of the property could properly be paid. But the executors were not required to wait until the beneficiaries were dead in order to apply sufficient of the yearly income to pay such expenses. But before they could justify a sale of the lands to make good a deficiency thus created, it was necessary for them to state an account and show that such deficiency did in fact exist.

The offer does not go that length. The facts proposed to be proved would show that some \$250 had been paid out by them; but how much surplus of income there was to apply toward it, is not shown or offered to be shown.

## Whiting v. Barrett.

It seems to me that it was the duty of the executors to proceed against the *cestuis que trust* for a settlement of their account before they could assume to act, on the ground that the income was insufficient to the support of either or all of the beneficiaries.

In dealing with the real estate the executors were not acting as executors but as trustees, and for that reason the surrogate rightly refused to settle their account relating to the real estate.

If the foregoing views are correct, the right of the trustees to be paid their expenses incurred in the preservation of the property is not lost, but may be adjusted in the distribution of the proceeds of the sale amongst the persons entitled.

The judgment of the referee must be affirmed with costs.  
Judgment affirmed.

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NATHAN WHITING, Receiver, &c., Appellant, v. CALEB BARRETT and LYDIA BARRETT, Respondents.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1872.)

Where the owner of personal property makes a verbal gift of it the donee acquires a perfect title, if he obtains possession of the property before revocation of the gift by the donor, although it was not present or even *in esse* when the gift was made. (Per MULLIN, P. J.)

The consent of the donor that the donee shall take the property as owner must be presumed, unless revoked, until possession is obtained. (*Id.*)

A recognition of the donee's ownership, by the donor, of property not present or *in esse* at the time of the gift, after the former has taken possession, renders the gift a perfect one, and completely transfers the title.

A soldier's bounty money being exempted from execution and proceedings supplementary thereto by statute (chap. 578 of 1864, § 4), the creditors of the soldier cannot interfere with it either in his hands or in the hands of his donee, and he having given it to his wife, and it having been invested by her in the purchase of real estate, the deed cannot be set aside at the instance of the husband's creditors.

THIS action was brought by Whiting, who was appointed receiver of the property of Caleb Barrett in proceedings sup-



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plementary to execution in an action brought in this court by Green Parker against Barrett, in which judgment was docketed in favor of Parker, on the 24th of April, 1867, for \$293.98 damages and costs, and also to set aside a deed given by one Hall to the defendant, Lydia Barrett.

In August, 1864, Barrett entered the army and thereupon became entitled to a bounty of \$1,000. He gave directions to the supervisors of the town, to fill the quota of which he had volunteered, to give the bonds to which he was entitled to his wife, and it was so done, and she kept them in her possession till her husband's return.

Barrett was in the army some ten months, when he was discharged, and returned home. He then took the town bonds and changed them for bonds of the United States, and delivered them to his wife, who kept possession of them until March, 1867, when he was applied to by one Greenly to lend him (G.) some money. Barrett told him he had none, but his wife had, which he thought she would let him have. B. sold the bonds, made a loan to Greenly, and took a note payable to Mrs. B. That note was paid in November, 1868.

After the money had been in the house a few days, B. told his wife it ought to be drawing interest, and he thereupon loaned \$700 of it, and took a note, by direction of his wife, payable to their son.

In 1868 B. applied to one Hall to purchase a farm of land of him, lying in the town of Worth, in the county of Jefferson, and after some negotiation a purchase was made, as B. says, by the direction of his wife, at \$600; \$300 of which was paid down to H. For the balance, \$300, a bond and mortgage were given. One hundred and fifty dollars, which had been loaned by B., were collected and paid on the mortgage, and the balance was paid by Mrs. B. out of money received from her father.

Mrs. B. testified that before her husband left for the army he gave her the bonds to which he was entitled in payment of his bounty.

The court below held and decided that this was a gift of

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the bonds to Mrs. B., and that she was entitled to hold the land purchased with the avails thereof as against the creditors of her husband. From this judgment the plaintiff appeals.

*N. Whiting* (in person), for the appellant.

*M. H. Merwin*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. Delivery of the thing given is absolutely essential to make valid the gift; but it is not essential that the delivery should be directly to the donee. It may be delivered to another person for him. (*Hunter v. Hunter*, 19 Barb., 631.)

I do not find any case in which it has been held that a parol gift of property not *in esse* or not in the possession or under the control of the donor at the time of the gift is valid where the donor subsequently, and before there is any revocation of the gift by the donor, obtains the possession, and the donor thereafter recognizes the donee as owner, nor do I find any decisions to the contrary.

In Brooks' Abridgment it is said, "if the owner of goods which are at York give them to J. L., who, at the time of the gift, is in London, and before J. L. has obtained actual possession of the goods a stranger takes them, J. L. may maintain an action of trespass against the stranger, for by the gift he acquired a general property in the goods." (*Sprately v. Wilson*, 3 Eng. Com. Law, 10, note.)

The reporter, after reciting the passage from Brooks, says: "But there is no case which goes to the extent of stating that the donor or his representatives might not retract a gift unaccompanied with possession."

In *Shower v. Pilick* (4 Exch., 478), it was held that a mere verbal gift of a chattel to a person in whose possession it is does not pass any property to the donee.

The direct opposite of this was held in *Champney v.*

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*Blanchard* (39 N. Y., 111). The plaintiff held in her hands money of the decedent, subject to her order, of which a memorandum was made and held by the latter. The decedent delivered to the plaintiff the memorandum, with a specific declaration that she gave her those moneys, and the court held there was such a delivery as perfected the gift.

It would seem to me that when the owner of property makes a verbal gift of it to another, such other acquires a perfect title if he gets possession of it before revocation of the gift by the donor, although it was not present when the gift was made, or it was not even *in esse* at the time.

The consent that the donor shall take the property as owner must be presumed, unless revoked, until possession is obtained.

It is not necessary that the revocation should be in words. Any act of the donor inconsistent with the right of the donee to control the property before he takes it into his possession, would probably operate as a revocation.

If, however, it is doubtful whether there was such a delivery as perfected the title of the wife to the bonds, the subsequent recognition of the title by the husband without any evidence of revocation of the gift, must render the gift perfect.

If the gift was a valid one, it vested the title to the bonds in the wife, and she became the legal owner thereof.

When the gift was made the bonds were exempt from the claims of creditors by virtue of § 4 of chap. 578 of the Laws of 1864, which declares "that the pay or bounty of any non-commissioned officer, musician or private in the military or naval service of the United States shall be exempt from seizure and shall not be liable to attachment, or levy, or sale under any execution or to proceedings supplementary to execution."

As creditors could acquire no right to them as against the soldier, he could transfer them by gift or sale to another person, relieved from any such claim. The wife, therefore, took the absolute title to the bonds and the creditors could not be heard to allege that the transfer was in fraud of them, as they

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never had and never could have any right to demand that they be applied in payment of their debts. .

Had the bonds not been exempt in the hands of defendant's husband, the creditors could insist that they were entitled to have them applied in satisfaction of their debts. And a gift of them by the husband to the wife while such debts existed, would be fraudulent and void as to them.

But being exempt, the gift was not fraudulent, and his creditors had no claim to the bonds.

The judgment must therefore be affirmed, with costs.

Judgment affirmed.

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THOMAS HIGGINS, Plaintiff in Error, v. THE PEOPLE,  
Defendants in Error.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1872.)

Upon a trial for larceny from the person, where the proof does not warrant a finding of the value of the property at less than \$25, a refusal to instruct the jury that the offence is petit larceny unless such value shall be found less than \$25 is not error.

Mere proof of the taking of bills of certain denominations, without proof of their genuineness as bills or circulating media, is insufficient to warrant conviction of larceny.

But it will be assumed on appeal that there was evidence of genuineness upon the trial, if the bill of exceptions does not show that it contains all the evidence given.

The taking of property from the person less than \$25 in value, and of bills of denominations exceeding in the aggregate that amount, but not shown to be genuine having been proved; *held*, that a request to instruct the jury that there was no evidence of a larceny was properly refused.

*Held*, further, that a conviction of grand larceny would be sustained on appeal, in the absence of a statement in the bill of exceptions that it contained all the evidence given at the trial.

APPEAL from judgment of General Sessions, rendered upon a conviction for grand larceny. The facts appear in the opinion.

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*D. O'Brien*, for the plaintiff in error.

*P. C. Williams*, for the defendants in error.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The plaintiff in error was indicted in the Jefferson Sessions for robbery and for stealing from the person of one James Roseboom a wallet of the value of one dollar, twenty-five promissory notes (commonly called bank bills) of national currency, issued by divers banking associations, to the jurors unknown, but of the value in the aggregate of fifty-one dollars. A more particular description of said notes and bills was to the jurors unknown.

The jury found the prisoner guilty of larceny from the person, charged in the indictment, and not guilty of the robbery.

The court sentenced the prisoner to imprisonment in the State prison at Auburn, at hard labor, for the term of three years and eight months.

The prisoner brings up the record by writ of error.

The prisoner's counsel requested the court to charge the jury that the offence, if any, was petit larceny, unless the jury can safely say, from the evidence, that the pocket-book or its contents were worth more than twenty-five dollars. The court refused so to charge; but did charge it was immaterial how much it (the pocket-book) contained; that the uncontradicted evidence, as to the amount of money by Roseboom, was that the amount was fifty-one dollars.

Section 2 of chapter 374 of the Laws of 1862 provides that whenever any larceny shall be committed by stealing, taking and conveying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars.

It was held by the Court of Appeals in *Williams v. The People* (24 N. Y., 405) that the word "may," in the foregoing section, is not imperative, but gives the court, in which the prisoner is convicted of stealing from the person less than

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twenty-five dollars, the same degree of punishment that would be proper, in its estimation, to inflict had the conviction been for grand larceny.

It was also held in the same case that it was the right of the prisoner to have the jury instructed that they should find in their verdict the value of the property stolen, to the end that the court might have satisfactory evidence of value to guide them in the exercise of the discretion vested in them by this section.

The finding as to the value can be of no importance to the prisoner, unless there is proof in the case which might authorize the jury to find it to be less than twenty-five dollars. When all the evidence is that the value exceeds twenty-five dollars, the refusal to instruct could do him no possible injury.

The question, then, is whether there was any evidence in the case which could authorize the jury to find the value of the property stolen to be less than twenty-five dollars.

Roseboom, from whom the property is alleged to have been stolen, was the only witness as to the value, and he says the bills which he lost were in a pocket-book; counted it before leaving his shop at Dexter, about three o'clock P. M. He did not count it all, but he had fifty-four dollars and some change. Went to Watertown and did not see the money to count it again that day. He last saw it in the evening, just before leaving Watertown; he had it in his pocket-book, and took out the pocket-book at the Exchange Hotel, and paid for a cigar; the bills he claims to have lost were in the pocket-book then, but he did not look to see; he thought they were. After arriving at the hotel in Brownville, he paid a doctor ten cents for medicine from change he had in his pocket-book; it lay on the top of a \$2 bill. He then observed the bills, put the pocket-book back into his pocket. Roseboom admitted he had been drinking during the afternoon after leaving Dexter, and before his money was taken. He had taken out his pocket-book in the hotel and was advised by one Hoover, who was with him, to put it back into his pocket. Hoover says he saw a lot of bills

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in his pocket-book, and saw him put it in his pocket; this was just before it was stolen. Two witnesses on the part of the defence testify that Roseboom had out his pocket-book in the tavern just before the struggle in which he says it was stolen from him, when offering to bet about running.

The evidence of Roseboom is positive that he had in bills the amount he specified at three o'clock P. M. His pocket-book, with bills in it, was seen by him at Watertown early in the evening, and at Brownville a short time before the stealing.

If any fact can be said to be established, the possession of fifty-one dollars in bills by Roseboom, at the time of the taking, must be held to be proved.

It is possible that Roseboom may swear falsely; he may have been so intoxicated as not to know or accurately remember all that occurred; he may have dropped from his pocket-book some of the bills while he had it out paying for articles purchased, or when offering to bet. If the proof would authorize the jury to find that part of the money was lost, it would also justify the finding that he had lost the whole, and there was none in the pocket-book when it was taken.

When it is shown that the money was in the pocket-book at three o'clock P. M., the presumption is that it remained there, unless the circumstances proved justify the inference that it was lost, and that inference cannot fairly be made in this case; on the contrary, the evidence of Roseboom strengthens the presumption that the money was still in the pocket-book.

The jury were justified in finding that the money in the pocket-book exceeded in value twenty-five dollars, and they could not find upon the evidence that the value was under twenty-five dollars.

The remark of the court in reply to the request to charge the proposition above stated, that it was immaterial how much the pocket-book contained, was erroneous as an abstract proposition, as is shown in the opinion of DENIO, Ch. J., in *Williams v. The People* (*supra*), but the remark could not, as I have attempted to show, do any injury to the prisoner

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as there was no evidence to authorize a finding that the property taken was worth less than twenty-five dollars.

To justify a conviction for larceny, it was incumbent on the public prosecutor to prove that property which by law might be the subject of larceny was unlawfully taken. At common law the felonious taking of choses in action was not larceny. (Arch. Crim. Pl., 164.) The stealing of bills, &c., is made larceny by statute. To be the subject of larceny they must be shown at least *prima facie* to be genuine, and, if made by a corporation of another State, *prima facie* evidence of its legal existence must be given. (*The People v. Caryl*, 12 Wend., 547; *Johnson v. The People*, 4 Den., 364.)

BRADLEY, J., was of the opinion that evidence that the prisoner had passed the bills as genuine would have been sufficient; so would evidence that bills of the same kind have been received and passed away in the ordinary course of business as a part of the business of the country.

In the case of *Fallon v. The People* (2 Keyes, 145), the money alleged to be stolen consisted of four five-dollar bills on banks in the State, and one ten-dollar bill of the American Bank of Rhode Island, and had been received on the day of the larceny from W. Hinslee, of Tonawanda, in payment for work done for him by the witness from whom the money was stolen.

The prisoner requested the court to charge that the fact that the ten-dollar bill was paid to Moin for his services by Hinslee, and was received by Moin in payment, was no evidence that it was a genuine bank bill, and that it was of the value of ten dollars, and that the jury could not convict of the stealing of the ten-dollar bill for the reason that the instrument in proof purported to be a bill of a bank of Rhode Island, and there was no evidence that there was any such bank, or that the note was genuine.

The instruction was refused and the Court of Appeals held the refusal was proper. WRIGHT, J., says: "On a presentation for stealing bank bills of another State, when the point



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is raised it is incumbent on the public prosecutor to give some proof of the existence of the bank, and that the bills are genuine; that such notes have been received and passed away as part of the currency of the country, is *prima facie* sufficient to prove the existence of the bank, as well as the genuineness of the notes. As the request was to charge that there was no evidence of the existence of the corporations, or of the genuineness of the bills, it was properly refused."

All the proof there was of the kind or amount of money in the pocket-book is that it consisted of three ten-dollar bills, four five-dollar bills, and a one-dollar bill; by what person or corporation issued, or whether they were genuine, there is not a particle of proof. Unless, therefore, this defect was cured by the omission of the prisoner's counsel to raise the objection that there was not sufficient proof of the value of the property to render the crime grand larceny, it was fatal to the verdict.

Judgments in criminal cases, except in capital cases and cases in which the *minimum* punishment is State prison for life, will not be reversed except for such defects appearing on the face of the record as render the conviction illegal or void, or for erroneous rulings on the law, to which exceptions were taken on the trial, and are contained in a bill of exceptions.

In *La Beau v. The People* (34 N. Y., 223, 228), WRIGHT, J., says: "We cannot entertain any question in respect to the sufficiency or strength of evidence that produced the conviction."

In the *People v. Haynes* (14 Wend., 546), it is said: "No bill of exceptions can be taken in a criminal case to authorize a Superior Court to correct an erroneous opinion of the court below or the decision of a jury upon matters of fact merely." (See, also, same case, 11 Wend., 557.)

It was formerly the practice for a Court of Sessions or of Oyer and Terminer, after verdict of guilty and before judgment, to ask the opinion of the General Term when in doubt whether the acts proved constitute a criminal offence. (*The People v. Caryl*, 11 Wend., 547; *Ex parte Barker*, 7 Cow.

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143; *The People v. Cummins*, 3 Park., 343.) But the practice has fallen into disuse.

Such a practice enabled the prisoner to obtain a review of the evidence, which he could not do on writ of error.

The prisoner's counsel called on the court at the close of the evidence to instruct the jury that there was not sufficient evidence to authorize the jury to find the prisoner guilty of larceny. The court refused to so instruct the jury, and he thereupon excepted. This refusal was equivalent to an instruction to the jury that there was sufficient evidence to authorize them to convict the prisoner.

There was at least sufficient evidence to require the jury to convict the prisoner of stealing the pocket-book, which was shown to be worth seventy-five cents.

When, therefore, the prisoner's counsel asked the court to discharge the prisoner or instruct them they could not safely convict of any offence, he asked more than he had the right to require, and the court was justified in refusing to grant it.

Had he limited his request to an instruction that they could not safely convict of grand larceny it should have been granted.

A bill of exceptions is supposed to contain only so much of the evidence as is necessary to present the questions of law raised on the trial. In the absence of a statement in the bill that it contains all the evidence given on the trial, the presumption is that it does not.

We must assume, therefore, that there was evidence given as to the value of the bills not incorporated in the case which was sufficient to authorize a conviction of grand larceny.

It is stated in the bill of exceptions that the prisoner's counsel moved, after verdict, in arrest of judgment on the ground, amongst others, that the money alleged to have been taken is not sufficiently described in the indictment or proved on the trial, and that the verdict is against the law and the evidence.

A writ of error does not bring up for review any errors but what occurred on the trial. (*Fallon v. The People, supra.*)

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It does not reach and the court cannot review the action of the inferior court in granting or refusing a new trial because the verdict was against the evidence and not supported by it. (*Fallon v. The People, supra.*)

The remaining points discussed by the counsel do not require any discussion as they were properly disposed of by the Court of Sessions.

The judgment must be affirmed.

Judgment affirmed.

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SAMUEL FLYNN, Appellant, v. DUDLEY FISH and another,  
Respondents.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1872.)

Where a partner sells his interest in his firm, including the stock and excepting the accounts and indebtedness due it, to his copartners, the sale covers amounts which the vendees have failed to pay in as partners to make their respective shares of the capital stock equal to the capital paid in by him, as well as their liability for moneys withdrawn by them from the firm.

On the 20th of September, 1866, the parties to this action entered into copartnership to carry on grocery and butchering business in the village of Phoenix, in the county of Oswego, under the firm name of Fish, Parsons & Co. There were no written articles of copartnership, but there was an understanding between the parties that each should contribute toward the capital firm \$1,000 to \$1,500, and to share equally in the profits and losses of the business.

The firm continued in business until the 15th of August, 1867, on which day it was dissolved by mutual consent, the plaintiff selling out his interest, except the accounts and indebtedness due the firm, or to become due, for the sum of \$1,025.68, which sum was to be paid as follows, viz.: The firm was to cancel its account against Flynn, the plaintiff, to the amount of \$766.04, release him from his share of the ren-

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of the store, which Fish & Parsons owned, amounting to forty-two dollars; and the balance, \$217.64, was to be paid in ninety days from the day of said dissolution.

It was further agreed between the parties that Fish & Parsons were to take the accounts, &c., owing to the firm and to collect the same, and out of the proceeds to pay, first, the expenses of collections, and to apply the balance on the debts due from the firm; and on the 1st of April, 1868, make a report to Flynn showing the amounts received and paid out under the agreement. If the amount received on the debts due was not enough to pay the debts owing by the firm, then each partner agreed to pay his *pro rata* share of the indebtedness; and if the amount collected exceeded the debts owing by the firm, then the excess was to be equally divided amongst them.

In performance of this agreement Fish & Parsons collected the sum of \$2,140.85. Included in this sum were \$132.80, the amount of an account on the books of the firm against Fish & Parsons. F. & P. paid for collecting the accounts, &c., and toward the debts of the old firm the sum of \$3,252.45, leaving due them \$1,111.60. The plaintiff received on debts due the firm after the dissolution six dollars, and of the defendants a harness at ten dollars.

The plaintiff commenced this action to compel an accounting by F. & P. of the receipts and disbursements respecting the accounts due from and to the firm, and the payment to plaintiff of such balance as should be due him on such accounting. He claimed that F. & P. had collected a much larger sum than they had paid on the debts due from the firm.

The answer set forth the facts substantially as stated, alleging that they had paid out much more than they had received, and prayed an accounting and payment to them by plaintiff of his proportion of such balance as should be found due on such accounting.

The cause was referred, and the referee found the facts as above stated, and the amount paid in by each partner as capital, the value of the goods on hand at the date of the

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dissolution, and that F. & P. collected all the accounts, &c., that were collectible, and ordered judgment against the plaintiff for \$384.52; being one-third part of the amount paid by the defendants over and above the amount received by them.

From this judgment the plaintiff appeals.

*C. W. Avery*, for the appellant.

*W. H. Kenyon*, for the respondents.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The plaintiff insists that, under the agreement entered into at the time of the dissolution, he was entitled to have included in the debts due to the firm the amount which defendants had failed to pay to make their respective shares of the capital stock equal to the amount paid in by him as capital.

The referee has not stated the account on this basis; and the neglect to so state it forms the principal ground of exception to the report.

By the contract of the 13th of August, 1867, the defendants bought and the plaintiff sold his interest in the entire property of the firm, including, in the words of the instrument, "the stock," excepting only debts due to it.

When the plaintiff parted with his interest in the firm for a specific sum of money to his copartners his right to an accounting in reference to capital and business of the firm ceased, unless expressly reserved.

The interest which the defendants got by their purchase was in part the capital paid in; and to permit the plaintiff to charge them for any part of their shares of the capital stock would be, in effect, taking back a part of that which he sold.

The reservation of accounts owing the firm did not entitle the plaintiff to treat the unpaid capital as a debt due to the firm by the partners who had omitted to pay it.

I have no doubt but that, in the absence of some agreement to the contrary, to entitle two or more persons to share

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equally in the profits of a copartnership each must contribute his proportion of the capital; and, if not done, he will be charged with the deficiency and interest thereon. (Story on Partnership, 497.) But that doctrine has no application to this case.

The defendants have bought and have paid for the interest the plaintiff had in the portion of the capital not paid in by defendants, and they and not the plaintiff own it.

The debts due the firm, which were excepted in the agreement of dissolution, were the debts due from persons other than the members of the firm. If this is not the meaning of the agreement the defendants got nothing by the agreement.

Let us suppose that the plaintiff paid in \$1,000 and drew out \$250; his share of the capital stock would be \$750. If each of the other partners put in \$500 and drew out \$250, they would each owe the firm \$450 to make them equal in interest to the plaintiff. And if there were no profits to be divided the defendants must make their interests equal to that of plaintiff, or his interest must be reduced to that of defendants.

If the sums supposed to be paid in constituted the entire capital with which the profits were earned, the plaintiff must be treated as a creditor of the firm for the amount advanced beyond his share of the capital; and upon that he would be entitled to interest in addition to his share of the profits.

Now in the case supposed the plaintiff sold his interest in the firm for \$750, and should he still be entitled to one-third of the unpaid capital and of the amount withdrawn by each of the defendants he would be entitled to receive one-third of the \$1,500 or \$500 in addition to his whole capital paid in.

Such a result would be too unjust to be tolerated.

If the plaintiff had sold his interest to a third person in no way connected with the members of the firm, excepting from the sale the debts due to the firm, would it be claimed that, after such a sale, he could come and demand of his

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former partners one-third of the unpaid capital and of the amount each had withdrawn from the firm?

The statement of the question furnishes the answer.

The plaintiff was clearly liable for his share of the moneys advanced toward the payment of the debts of the firm and the expenses of collection of the debts due to it; and this is all he is called on to pay.

The ground on which I place my decision in the case is the plaintiff sold and the defendants purchased plaintiff's interest in the debts due by the defendants to the firm, whether such debt was for unpaid capital or for money or property taken from the firm.

The judgment must be affirmed, with costs.

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EDWARD A. WETMORE et al., Respondents, v. CATHERINE A.  
PARKER et al., Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, SEPTEMBER, 1872.)

An invalid trust, under the Revised Statutes, will not be upheld because it is for charitable uses.

But a bequest to a corporation to enable it to carry out all or any of the purposes for which it is created is valid; and this is so although the duration of the trust is unlimited.

In determining whether a legacy to a corporation would increase its property beyond what the law authorizes it to hold, the indebtedness of the corporation for its property is to be deducted from the estimate.

Where there was a bequest of the residuum "to the several persons, corporations and societies to whom I have hereinbefore made bequests, in proportion to the amounts bequeathed to them respectively,"—*Held*, that codicils, revoking certain general legacies for specific objects, did not affect the interests which the legatees took in the residuum by reason of such prior bequests.

Service of citations to probate of a will before the surrogate by a party interested, is legal and valid.

THIS was an appeal by Catherine A. Parker, one of the defendants, from a judgment entered upon the decision of the Special Term.

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The action was brought to obtain a judicial construction of the will and codicils of Roxana Childs, deceased. The will, among other bequests, contained the following, viz. :

"*Fifth.* I give the sum of \$25,000 to the Utica Orphan asylum (now having its buildings on the road from Utica to New Hartford), to be perpetually invested by the trustees or managers thereof in the public stocks of the United States, or of the State of New York, or in bonds and mortgages upon real estate, the fair value of which shall in all cases be at least double the amount secured by the mortgages, exclusive of the value of the buildings; and the interest and income of which sum (and only the interest and income) shall be expended by the trustees or managers, in their discretion, for the support and maintenance of said asylum, having special reference to the suitable and comfortable care of and provision for the orphans in their charge; it being my will, however, that a sufficient portion of the interest and income first derived from said investment be used for procuring, affixing and finishing suitable outside blinds for the windows of the asylum buildings; provided that such blinds shall not have been furnished before this bequest shall take effect.

"*Sixth.* I give the sum of \$10,000 to the Reformed Dutch church, in the city of Utica, to be expended in the erection and completion of their church edifice now erecting on the corner of Genesee and Cornelia streets, or in paying any debt which may have been incurred in such erection and completion; and if the whole or any part of said sum shall not be required for that purpose, then it is my will that the said part thereof shall be securely and perpetually invested in bonds and mortgages, and in the public stocks of the United States, or of the State of New York, and the interest and income thereof (and only the interest and income) shall be expended for the use and benefit of said church, and in such manner and for such objects as the trustees, consistory or other persons having charge of the temporalities thereof shall deem best."

The residuary, or seventeenth clause of the will, was in the following words :



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"*Seventeenth.* I give and bequeath all the rest and residue of my estate to the several persons, corporations and societies to whom I have hereinbefore made bequests, and who shall be living and existing and able to take the same, in proportion to the amounts given and bequeathed to them respectively; but this is not to apply to the annuity to my sister."

There were also two codicils, viz.:

"*Whereas*, by the eleventh clause of my said will I have devised to the Utica Female Academy the sum of \$10,000, as is particularly set forth in said clause; and whereas, I have at this time given to the said academy the sum of three thousand dollars (\$3,000) to said academy, intending the same to be part of and to be paid in anticipation of so much of said legacy. Now, therefore, I do hereby revoke the bequest of \$3,000, part of the said sum of \$10,000, and do hereby bequeath to the said Utica Female academy the sum of \$7,000 (instead of \$10,000), to be expended by the trustees thereof for the purposes of and in the manner prescribed in and by the said eleventh clause of my said will. Dated at Utica, December the ninth, 1867.

"I having given, by the sixth clause of my said will, the sum of \$10,000 to the Reformed Dutch church, in Utica, for the purpose, principally, of aiding in the erection of its church edifice and in paying any debt that might thereby be incurred; and it now appearing probable that said purpose will soon be accomplished, and I having concluded to give at this time the sum of \$3,000 towards the extinguishment of the debt incurred as aforesaid, do hereby revoke my said bequest of \$10,000 to the said Reformed Dutch church. Dated February 29, 1868."

Issues were tried in the action, and it was found that the will and codicils were duly made and published, and were valid to convey both real and personal estate, and that they were duly proved and admitted to probate before the proper surrogate, and letters testamentary issued thereon to the plaintiffs. That the several corporate bodies entitled by the provisions of the will were duly incor-

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porated and had power to receive the several legacies given to them by such will and codicils, and that the revocation of the legacies to Utica Orphan asylum, in part, and to the Reformed Dutch church, of Utica, did not affect the interest of those bodies under the residuary clause, but that they were entitled to receive the provisions made for them in the residuary clause to the same extent as if the codicils had not been made.

Exceptions were duly taken to the findings of the court, and the defendant, Catherine A. Parker, appealed.

*C. E. Tracy*, for the appellant.

*Francis Kernan and Adams & Swan*, for the respondent.

Present—MULLIN, P. J.; JOHNSON and TALCOTT, JJ.

MULLIN, P. J. It would not be claimed, if the English laws relating to charitable uses were in force in this State, that the bequests, whose validity is disputed by the appellants, are not valid.

The Court of Appeals held in the case of *Williams v. Williams* (4 Seld., 525), that those laws were in force in this State, and therefore a bequest to several persons of money to be applied *to the education of poor children* was valid, on the sole ground that the use was a charitable one.

At the same term in which the case of *Williams v. Williams* was decided, the court applied the principles laid down in that case in several other cases, as appears by a note of the reporter at the end of the case.

The case of *Williams v. Williams*, so far as it held that the laws relating to charitable uses was in full force in this State, and that a bequest for charitable uses was valid, although a trust valid under the Revised Statutes was not created, nor a trustee appointed, authorized by law to take in perpetuity, was questioned by WRIGHT, J., in *Levy v. Levy* (33 N. Y., 97), and was reversed as to those propositions in *Bascom v. Albert-*

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son (34 N. Y., 584), and the correctness of the reversal recognized in several subsequent cases.

The bequests in the will of Mrs. Childs to the Orphan asylum, to the female academy, to the Dutch church and the cemetery association, cannot be sustained merely because they are charitable uses, and it only remains to inquire whether as corporate bodies they are able to take and entitled to hold property given to them for the purposes of their incorporation.

They are each and all of them incorporated either under general laws providing for the creation of corporations of the description to which they severally belong, or by special acts of the legislature.

In *Williams v. Williams* there was a bequest to the trustees of the Presbyterian church and congregation in the village of Huntington, and their successors in trust for the support of a minister of said church as now constituted, to be managed in the following manner: The principal to be loaned on good landed security of twice the value of the sum loaned, and one-half the interest annually accruing to be added to the principal, until the fund shall amount to \$10,000, the whole interest annually accruing to be annually applied to the support of the gospel minister in said church, as now constituted. No part of the fund was to be applied to building or repairing the church, and any diversion of the fund from the purposes for which it was given was to operate as a forfeiture in favor of his residuary legatees.

This bequest was held valid, but the direction for accumulation was held to be invalid.

DENIO, J., says: At common law a corporation could always take a bequest of such personal property as it could lawfully acquire by any other mode of purchase. Religious corporations, under the general statutes, are authorized to purchase and hold real and personal estate to a limited amount \* \* \* the right to take and hold property clearly extends to such as may be necessary within the specified limit for the purposes of the church, congregation or society.

The learned judge is also of the opinion that a bequest to

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a corporation is not rendered invalid when given for a part only of the purposes for which a corporation is created. The conclusion was arrived at by the Chancellor in *The matter of Howe* (1 Paige, 214). The case of *Williams v. Williams* must therefore be held to decide that a bequest to a corporation, to enable it to carry out all or any of the purposes for which it was created, is valid.

And also such a bequest is valid, notwithstanding it creates a perpetuity contrary to the provisions of the 1st Revised Statutes, 773, § 1, by which the absolute ownership of personal property is forbidden to be suspended by will for more than two lives in being at the death of the testator.

It is not necessary to repeat the argument by which the proposition is supported. It is enough to say that, as corporations—especially corporations for charitable purposes—are intended to exist for an indefinite time, they must be able to take and hold property in perpetuity, or the object of their creation would be totally defeated.

To this proposition I am not aware of any answer.

In *Bascom v. Albertson* (34 N. Y., 584), the case of *Williams v. Williams* is approved so far as it declared valid the bequest to the Presbyterian church. PORTER, J., says: We entertain no doubt that the bequest to the Presbyterian church in Huntington was properly upheld. It was a gift to a religious corporation legally authorized to take and hold the fund for purposes within the scope of its charter.

In *Adams v. Perry* (43 N. Y., 487-500), the correctness of the decision in the case of *Williams*, as to the validity of the bequest to the church, is again conceded, and again in *Chamberlain v. Chamberlain* (43 N. Y., 424).

The orphan asylum was re-incorporated in 1856, and the charter is to continue in force until repealed by the legislature. The act declares that the sole object of said society shall be the support and education of orphan children. It is authorized to take by gift, grant, devise, bequest or purchase, and hold real and personal estate, for the purposes for which it is incorporated, to an amount not exceeding \$150,000.

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Under the charter the society may continue forever, and will so continue unless the legislature shall repeal it.

This limitation, if it can be called one, attends all legislative acts which do not operate as contracts; and, hence, the charter to this corporation is as perpetual in duration as it is possible for the legislature to create.

We have, then, a corporation without limit as to existence authorized to take by gift or bequest to an amount not reached by the bequest under this will.

The bequest is for the support and maintenance of the asylum, and is, therefore, for the very purpose for which the corporation was created.

The bequest is, therefore, to be governed by the same rules as the bequest to the church in the case of Williams. It is to a corporation without limit to its existence and for the purposes of its creation, and it is expressly authorized to take for such purposes.

Although a perpetuity is created, it is authorized by the same authority that forbids the creation of perpetuities, and is not, therefore, in violation of the provisions of the Revised Statutes prohibiting the creation of such interests.

The objection to the bequest to the female seminary is, that before the legacy vested, the seminary held property to the amount it was authorized by its charter to take and hold; and, hence, the bequest of Mrs. Childs lapsed, because the legatee was incapable of taking.

This is a question partly of fact and partly of law. The value of the property owned by the asylum is one of fact, and it is not suggested that the finding of the court on that point is incorrect.

We must assume the value thereof to be \$25,000. To reach this amount the court below deducted from the value of the property of the seminary \$15,000 which it owed for the erection of the seminary building, and which sum was secured by a mortgage on its real estate. This deduction was properly made.

A man who owns a farm worth \$10,000, but owes \$5,000

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of the purchase-money, is worth but \$5,000. Whether the debt is secured by a lien on the farm or is in a promissory note, he really is worth so much of the value of the farm as he has paid for. It is true he owns the farm and may be able in law to sell it and pass a valid title to the purchaser, yet, equitably, he is entitled only to so much as the farm brings or is worth, over and above the sum he owes for it.

The legislature could not have intended to require that the debts of a corporation should be included in determining the amount of property it might take and hold under its charter; and as such a mode of computation is unjust it ought not to be applied, unless it is clearly demanded by the language of the charter.

If this view is correct, it renders it unnecessary to inquire whether the seminary is not entitled to take and hold property to an amount larger than \$35,000, as it does not hold that amount if the \$15,000 of indebtedness are deducted from the value of its property.

By the seventeenth clause of the will the testatrix bequeaths to the several persons, corporations and societies to whom she had, in and by said will, made bequests, who should be living and existing and able to take the same in proportion to the amounts given and bequeathed to them respectively.

By the eleventh clause of the will \$10,000 were given to the seminary; and by the sixth clause the same amount was given to the Reformed Dutch church of Utica.

By the first codicil the bequest to the seminary was reduced to \$7,000; and by the second codicil the bequest to the church was revoked. Notwithstanding this reduction and revocation, the seminary and church claim to share in the residue, in the proportion to the bequests given by the will, disregarding altogether the codicils.

On the other side it is insisted that the seminary is entitled to share in the residue in the proportion of \$7,000, that being the amount to which it is entitled under the will; and that the church is not entitled to any share, because the bequest to it in the will is revoked by the codicil.

The court below was right in holding these corporations entitled to share in the residue of the estate, in proportion to the amounts given them by the will.

Two distinct and independent bequests are given by the will. One gives to each \$10,000, the other a share in the residuum of the estate after paying debts and legacies. These bequests are no way connected together, and are to be paid out of different funds.

The residuum is given "*to the several persons, corporations and societies*" to whom I have hereinbefore made bequests, in proportion to the amounts given and bequeathed to them respectively.

In order to ascertain who are to share in the residue, we have only to ascertain to whom bequests had been given by the preceding clauses of the will.

The church and seminary had bequests made to them by the clauses of the will preceding the seventeenth or residuary clause, and are, therefore, entitled to share in the residue.

A codicil does not interfere with any of the specific provisions of the will, unless its language naturally and obviously produce such result, or the terms of the codicil expressly recognize the alteration. (1 Redfield on Wills, 362, note 70, and cases cited.)

This rule has been carried to the extent of enabling two persons to prove a will and codicil, one of whom was named as sole executor in the will and the other sole executor in the codicil. (*Greaves v. Price*, 32 Law J., 113; 5 J. C. R., 343; 1 Jameson on Wills, 160, 166, note 2; *Kane v. Astor*, 5 Seld., 113; *Quincy v. Rogers*, 9 Cush., 291.)

Had the two bequests to the church and to the seminary been for the same specific purpose, it might be claimed with some color of plausibility that the revocation of one should be taken as proof of an intention to revoke both; but the one of \$10,000 is for a specific purpose, and the other is without any restriction as to the use to which it may be applied, and is applicable to any of the purposes to which the corporation by its charter may apply its funds.

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If the testatrix had given a definite sum to the church and seminary, in the seventeenth clause, instead of a portion of the residuum, could it be fairly claimed that the revocation of one of the bequests was also a revocation of the other? No case can be found, I apprehend, sanctioning any such proposition.

If a revocation would not annul both bequests in the case supposed, why should the revocation of the legacy of \$10,000 to the church destroy that of a share in the residuum of the estate, especially where there is no sort of connection between them? Both can stand without doing any violence to the intention of the testatrix, as disclosed in the will.

The appellants' counsel does not furnish us any data by which to determine whether or not the allowance made for counsel is or is not reasonable.

There is nothing in the case to show that they did not earn the sums allowed. The court below was cognizant of the amount of labor performed; we are not, except by the amount of matter appearing in the case. This is not enough to justify us in repudiating the allowance.

If affidavits had been presented to the court, as to the services rendered by counsel, and those affidavits had been incorporated in the case, we would then have been able to have formed an intelligent opinion as to the correctness of the allowance. The allowance is not so exorbitant as to justify us in rejecting it as exorbitant, in the absence of any evidence tending to prove it so to be.

I entertain no doubt but that the surrogate had jurisdiction to admit the will to probate; the service of the citations by persons interested in the will was entirely legal and proper. This mode of service has been too generally followed in this State to permit us to hold it improper or illegal, as to do so would produce a vast amount of litigation and unsettle the title to a large share of the property in it.

The judgment should be affirmed, with costs to be paid by the appellants.

Judgment affirmed.



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Miller v. Adams.

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AMASA O. MILLER, Appellant, v. JAMES R. ADAMS, Respondent.

(GENERAL TERM, FOURTH DEPARTMENT, SEPTEMBER, 1872.)

An order under § 294, Code, requiring one having property of or indebted to a judgment debtor to appear and answer, etc., is within the jurisdiction of the judge of the county to which execution has issued on the judgment.

An order obtained, on incompetent evidence of jurisdictional facts, from a court of record, or officer acting judicially in determining the question of jurisdiction, is, in the absence of bad faith, protection to the party instituting the proceedings therefor.

Six propositions, embracing rules of liability of parties in such cases, stated (per MULLIN, P. J.).

If the county judge issues an attachment for disobedience to his order under § 294, it is presumed to have been issued on proper proof of the fact.

And in an action of false imprisonment upon arrest under such an attachment, where the county judge testified that he could not remember the nature of the proof but thought proper proof had been made,—*Held*, that the *onus* remained with the plaintiff to prove the negative.

Reversal by the General Term of an order denying a motion in the County Court to set aside proceedings does not without an order to that effect set them aside.

THIS was a motion to the General Term upon a case and exceptions ordered to be heard there in the first instance. The facts as they appeared were as follows:

The defendant recovered a judgment against Joseph S. Thompson, before a justice of the peace of Wayne county, a transcript of which was duly filed in the clerk's office of that county, and an execution duly issued and returned wholly unsatisfied.

The attorney for the plaintiff in the judgment, made affidavit of these facts, and that "*he had been informed and believed that Amasa O. Miller (the plaintiff) and Charles P. Moody, each, has property of said Thompson and are indebted to him in an amount exceeding ten dollars.*"

This affidavit was presented to the county judge and an order made by him requiring Miller and Moody to appear before him, at a time and place specified, to be examined con-

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cerning the property alleged to be held by them, and the indebtedness due to the judgment debtor; the affidavit and order were personally served on Miller and Moody, and an affidavit of the service delivered to the judge.

The plaintiff did not appear in obedience to the order, and thereupon, and without, as plaintiff alleged, any proof by affidavit of failure to appear, the county judge issued an attachment against him (plaintiff) for contempt, upon which he was arrested and taken before the judge and bailed.

When brought before the county judge, the plaintiff objected to the proceedings on three grounds:

1. That the party did not produce any proof, by affidavit or otherwise, that the parties, attached, were in default.

2. Copies of the affidavit, and other papers, were not served on defendant.

3. The county judge did not prescribe the penalty, in which defendant should be held to bail.

The plaintiff conceded he did not attend before the judge on the day specified for his appearance.

The county judge was examined as a witness on the trial of this case and testified that he had no distinct recollection whether an affidavit of plaintiff's non-appearance was or was not indorsed on the order requiring him to appear. He also testified that there must have been some proof before him that plaintiff did not appear, but had no recollection of any such proof.

Subsequent to the foregoing proceedings a motion was made on the part of the defendant in the execution to set aside the order made by the county judge in the supplementary proceedings, which was denied.

On appeal to the General Term of the Supreme Court, the order was reversed, with costs.

The plaintiff brought this action to recover damages sustained by the alleged false imprisonment on the attachment.

The plaintiff was nonsuited, and he moved for a new trial, on exceptions which were ordered to be heard in the first instance at the General Term.

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*M. Hopkins*, for the appellant.

*Chas. McLouth*, for the respondent.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The plaintiff bases his motion for a new trial upon two grounds, viz. :

1st. Because of the absence of proof before the county judge that plaintiff was indebted to Thompson, the judgment debtor, in any sum ; and

2d. Because it was not proved before the county judge that the plaintiff did not appear in obedience to the order requiring him to appear.

The plaintiff's counsel insists that the statement as to plaintiff's indebtedness being on information and belief, it was no legal proof of such indebtedness, and without it the judge had no jurisdiction to make the order requiring the plaintiff to appear, and the whole proceeding was void.

Section 292 of the Code gives county judges jurisdiction to entertain proceedings supplementary to execution. They have, therefore, jurisdiction of the subject-matter.

These supplementary proceedings are in the action, so that, upon presentation of an affidavit showing the recovery of the judgment and the issuing of an execution, the officer may require the attendance of the debtor to be examined concerning his property, to the end that it may be levied on and sold to satisfy the judgment ; and upon showing that the execution is returned wholly unsatisfied, he may require the debtor's attendance to be examined in order to ascertain whether he has any property, whether subject to be taken on execution or not, out of which to satisfy such judgment. And on proof that some person named has property of the judgment debtor, or is indebted to him, he may be required to appear and answer in relation thereto. These facts are to be proved to enable the judge to obtain jurisdiction of the person of the defendant in the judgment or his debtor.

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There can be no doubt but that the county judge has jurisdiction to make an order requiring the judgment debtor to appear. To authorize him to make an order that the debtor of the judgment debtor appear, there must have been proof before him that he had property of or was indebted to the judgment debtor. Such proof was made, but it was upon information and belief, and hence it is claimed the county judge did not acquire jurisdiction.

It has been held that when a fact is to be proved in order to enable the court or officer to entertain a proceeding not in the progress of an action, such fact must be established by competent legal evidence, and that information and belief is not such evidence, and if received the proceedings will be set aside. (*Ex parte Haynes*, 18 Wend., 611; *Cadwell v. Colgate*, 7 Barb., 253; *Matter of Bliss*, 7 Hill, 187.) But it does not follow that the officer before whom the proceedings were instituted, or the party by whom or for whose benefit they were instituted, is liable for false imprisonment for the arrest of the person, or for trespass for unlawfully taking property of the party proceeded against. In *Harman v. Brotherson* (1 Den., 537) the recorder of Schenectady was sued for false imprisonment for making an order to hold the plaintiff to bail on a *capias*, upon an affidavit of the plaintiff, in which he stated from information and belief that the defendant in that action had been guilty of carelessness and negligence in the care of a horse, for the loss of which, through the defendant's negligence, the action was brought. It was insisted that the proof was wholly insufficient to establish a cause of action so as to justify making the order of arrest. The plaintiff had a verdict in the Common Pleas of Schenectady, and the defendant brought error to the Supreme Court. The judgment was reversed.

BRONSON, Ch. J., referring to the defect of proof in the affidavit, says: If Brotherson (the defendant in the *capias*) had moved the court, the order to hold to bail would have been revoked. But it is a very different question whether the officer who made the order can be treated as a trespasser. It

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was a case when upon proper proof an order to hold to bail might be made. A *capias* and affidavit were laid before the officer, the affidavit making out a fair case for the exercise of his judgment. He had jurisdiction of the matter and acted judicially in making the order, and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment.

If the affidavit was sufficient to protect the judge in that case, it must have been sufficient to protect the party who procured it. The former is exempt from liability because the law makes it his duty to determine whether a case is made which authorizes him to act; and he is not liable for an error of judgment. Now, the party is compelled to submit his proofs to the judge, and is bound by his decision. Upon what principle, then, can he be held liable for the error of judgment, while the one who commits it is exempt from liability for it? In *Von Latham v. Libby* (38 Barb., 339) the party who instituted criminal proceedings before a magistrate for an act which was not criminal was held not liable. The decision of the magistrate, that the proof showed that a criminal offence had been committed, was a protection to him; and it would seem to have been the opinion of the learned judge that the party was exempt from liability in cases in which the officer himself might be liable.

Several English cases are referred to, in which the non-liability of the party commencing proceedings before a magistrate is declared in the strongest terms, because they had submitted what they were advised was evidence sufficient to confer jurisdiction on the officers to whom the application was made, and he had held it sufficient.

It is doubtless true, or was said in the case of *Von Latham v. Libby*, that there may be such a defect in the proof presented to the officer, and on which he acts, as to show bad faith; and in such case he may be liable.

But swearing to a fact on information and belief cannot be held evidence of bad faith; as scarcely one layman in a thousand is aware that it is not competent, legal evidence.

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(See opinion written by me in *Hall v. Munger* in this General Term, argued at May term, 1871, in which the cases on the question now under consideration are collected and reviewed.\*)

It seems to me the following propositions may be considered established in this State, viz. :

1st. That a judge of a court of record is not civilly liable for any error of judgment he may commit, although it may be intentional.

2d. A court or officer of inferior jurisdiction is liable to the party injured when he or it acts without having jurisdiction of the subject-matter, and of the person of the party proceeded against, unless the question whether jurisdiction is acquired is a judicial one, to be determined by such court or officer; in which case the decision is a protection to him or it and to the party.

3d. When the evidence presented to the court or officer has a tendency to prove the facts required to be proved to confer jurisdiction, the decision protects the court or officer, and also the party.

4th. When a party or his attorney may lawfully issue process against the person or property of a party, they are liable if the process is issued in a case not authorized by law; and when it is issued in a case in which it may lawfully issue, but it is issued irregularly, they are liable only after it is set aside for such irregularity. While it remains in force it is a protection.

5th. While it is true that process issued by a court or officer in favor of a party upon proof, to be made to the satisfaction of such court or officer, although it may be issued erroneously, it is a protection to him; yet, if he interferes in the arrest beyond taking out the process and delivering it to an officer to be executed, he is liable for such unauthorized interference.

6th. The party who maliciously and in bad faith extends the jurisdiction of a court or officer to a case to which it

\* Reported 5 Lansing, 100.

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cannot lawfully be extended is liable to the party injured thereby.

The point made by the appellant's counsel, that the county judge did not acquire jurisdiction to issue an attachment against the plaintiff, because no proof of his non-appearance, in obedience to his order, was proved before him, is not available to him, because the fact that such proof was not made cannot, on the evidence, be said to be established.

The presumption of law is that proof was made, if it was necessary to authorize him to issue the process; and he swears he thinks such proof was made, but he does not recollect of any affidavit or how otherwise the proof was made. In a word, he does not admit that no proof was made; and it was incumbent on the plaintiff, under the circumstances of this case, to establish the negative, or, in other words, to overcome the slight evidence that such proof was made.

The orders in the supplementary proceedings have not been vacated or set aside. The County Court denied the motion to set them aside, and the General Term reversed that order. This left the orders in force. The General Term should have made an order setting aside the proceedings. Not doing it, they are left in force.

If the plaintiff was rightly nonsuited there was nothing to submit to the jury. A new trial should be denied.

A new trial denied.

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Excelsior Fire Insurance Co. v. Royal Insurance Co. of Liverpool

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THE EXCELSIOR FIRE INSURANCE COMPANY AND WILLIAM M. TWEED, Jr., Receiver, &c., of the Commonwealth Insurance Company, v. THE ROYAL INSURANCE COMPANY OF LIVERPOOL.

(GENERAL TERM, FOURTH DEPARTMENT, SEPTEMBER, 1872.)

One who has a contract for the purchase of a mortgage, the purchase-money being payable by installments, and who has made part payment under the contract, is, in equity, the owner of the mortgage, and his insurable interest in the property covered by it is the full amount due and to become due thereupon.

An agent for plaintiff, an insurance company, having made an insurance upon property, was directed by his principal to cancel the policy. He did not do so, but applied to the agents of defendant for reinsurance upon the risk, which they refused, but consented to insure the interest of the owner in the property for the amount insured by plaintiff. The policy issued by defendant to the owner was never delivered to her, but remained in the possession of plaintiff's agent at the time the property was burned. After the fire the owner paid the premium due to defendant and assigned the policy to the plaintiff. The conditions of the policy required that in case of other insurance the defendant should pay *pro rata*. *Held*, that defendant was not liable to plaintiff as re-insurer of the risk, but that plaintiff, as assignee of the owner, could recover a part of the insurance made by the defendant, proportionate to the amount of insurance upon the property.

Whether, if the plaintiff had purchased the policy of defendant from the insured, not being liable upon the policies issued by it, the purchase would have been valid, *quere*. (Per MULLIN, J.)

A ratification by the insured of the act of her agent in making the insurance is sufficient, if made after a loss has occurred.

No request having been made on the trial to submit a controverted fact to the jury, it becomes the province of the court to determine the fact, and its decision is final.

In August, 1865, James Connolly was owner of a grist-mill in the city of Rochester, which was subject to two mortgages of \$10,000 each, held by one Dows.

In July, 1870, Mrs. Connolly, the wife of the mortgagor, entered into a contract with Dows for the purchase of said mortgages for \$15,000, to be paid as follows: \$2,500 to be paid down, \$5,000 on the 1st of August following, and the bal-



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ance in installments, which Mrs. C. covenanted to pay. Mrs. C. made the first two payments, amounting to \$7,500.

In December, 1870, Mr. C., acting for his wife, but without any express authority from her, applied to William McCarthy, an insurance agent in Rochester, for an insurance on the mortgage interest of his wife in said mill to the amount of \$7,500. McC. was agent for the Excelsior and Commonwealth Insurance Companies.

Some days after, Mr. C. called on McC., and two policies, one in each of those companies, were delivered to him for \$3,750, whereby Mrs. C.'s mortgage interest was insured for one year.

These policies were delivered to Mrs. C. and retained by her.

When the agent notified the companies of the issue of these policies, they directed him to cancel them, but it was never done.

Instead of canceling, McCarthy applied to French & Smith, the defendant's agents at Rochester, for re-insurance on the risk taken in the Commonwealth Company. They refused. In a day or two McC. was directed to cancel the Excelsior policy, and he again called on defendant's agent to reinsure. In a short time after this application, defendant's agent inquired of McCarty whether a direct insurance of the interest of Mrs. C. would not be as well as a re-insurance of the risks in the two insurance companies, and he told them it would, and thereupon defendant's agent issued two binding receipts, as they are called, whereby the defendant insured Mrs. C. for fifteen days, unless policy was issued in the mean time, and in a few days thereafter a policy was issued by defendant's agent, insuring Mrs. C.'s interest in the mill for one year for \$7,500. The premium on this policy was paid by Connolly for his wife after the destruction of the building by fire. The policy issued by defendant was not delivered by McC. to Mrs. Connolly till after the fire, nor was she or her husband aware of its existence until then.

The building was destroyed by fire on the 23d December,

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1870, and proofs of loss duly made and delivered to the several companies, including the defendants.

When the premium on the defendant's policy was paid by C. on behalf of his wife, the defendant's agent gave a receipt for the amount under protest, as claimed by defendant's witnesses, but without protest, as claimed by the plaintiff's witnesses. The amount so paid to the agent was remitted to defendant by them and retained, but subsequently offered back, but not received.

When this money was sent by the agent and received by the company, they had been told that Mrs. C. still held the policies issued by the Commonwealth and Excelsior companies.

Mrs. C., in the proofs of loss delivered to the Commonwealth Insurance Company, stated that the policy from defendant's company was procured by McC., or by his direction or procurement, and entirely without the knowledge, privity, authority or consent of her, said Mrs. C.; that she had no notice, knowledge or information in relation thereto until after the burning of the mill, and McC. retained said policy in his hands, or in the hands of his clerk, until after said fire; that she had no knowledge or notice that it was the intention of McC. to substitute defendant's policy for those issued by the other two companies until after the fire.

It does not appear by the case that the mortgages have ever been assigned by Dows to Mrs. C., nor is she entitled to such assignment until the whole purchase-price is paid.

Mrs. C. has assigned her interest in the policies issued by defendant to the plaintiffs.

The plaintiffs bring this action to recover of defendants: 1st, as re-insurers of the risks taken by the Commonwealth and Excelsior companies; and 2d, as assignees of Mrs. C. of the policy issued by defendants to her.

*W. F. Cogswell*, for the plaintiff.

*A. J. Parker*, for the defendant.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

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MULLIN, P. J. The Commonwealth and Excelsior companies must be deemed to concede their liability upon the policies issued by them to Mrs. C. It cannot be claimed, therefore, that those policies have ever been canceled or surrendered.

If the defendant's policy is an operative, valid contract in the hands of the plaintiffs as assignees of Mrs. C., she had insured her interest in the mills to the extent of \$15,000, although she had in fact paid towards the mortgage but \$7,500 up to the time of the fire, and we are not informed that she has paid anything since.

The agreement between Mrs. C. and Dows is not before us. We must assume that it was an agreement by Dows to sell, and, on payment of the purchase-money by Mrs. C., to assign the mortgages to her, and on her part a covenant to pay such purchase-price.

If this is the substance of the agreement, Mrs. C., by virtue of it, became the equitable owner of the mortgages, and entitled to insure them to the extent of her interest, which was the amount due or to become due on the mortgages. Her covenant to pay stood in lieu of the money, the legal title to the mortgages being retained by Dows as security for the payment of the purchase-money. (Angel on Insurance, § 66, and cases cited.)

In the section cited the author speaks of insurance by the purchaser of real estate by contract; such purchaser is in equity deemed the owner, and entitled to insure to the extent of the value, although he has not paid the purchase-money, but only obligated himself to pay. The same doctrine must apply to the purchaser of personal property, who has an equitable title to it merely.

The defendant's policy contained a provision that in case there should be any insurance in any other company extending to the property thereby insured, it (the defendant) should only be liable to pay its ratable proportion of the damage ascertained in accordance with the conditions of said policy.

The result is that, treating all these policies as valid, the

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insured could recover of the defendant but one-half of the amount of the loss. (*Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 265.)

To escape this result the plaintiffs' counsel insists that the defendant is a re-insurer of the property, and in that character liable to the Commonwealth and Excelsior Insurance Companies for the whole amount of the loss.

The policy of the defendant does not purport to be, nor is it in its terms, a contract of re-insurance, but on the contrary is a contract for insurance between the defendant and the equitable owner of the property, of her interest in it.

But it is said that the plaintiffs' agent applied for re-insurance, and the policy was issued by defendant for the purpose of re-insuring the risk taken by the plaintiffs.

It is true that McCarthy, the agent for both the Commonwealth and Excelsior companies, applied to defendant's agent to re-insure. The agents of defendant refused to re-insure, but expressed their willingness to issue a policy equal to the amount insured in the other companies, and this was assented to by McCarthy. In making the application to re-insure and in obtaining the new policy McC. was not acting for any person. He was disobeying the instructions of his principals in not canceling the policies issued in their names, and sought the re-insurance to protect his principal in case of loss, and in order to retain the custom of Connolly, who had been accustomed to do business with him as agent.

The defendant was not informed that a re-insurance had been applied for; its officers must have understood that the application on which they were called to act was for an insurance by Mrs. C.

If the defendant was chargeable with the acts of the agent not communicated to them, but which were wholly inconsistent with the knowledge communicated by him and with the act which he called on its officers to perform, it cannot be said on the proof in the case that the defendant's agent understood that the policy issued by the defendant was to operate as a re-insurance. If they issued the policy for the purpose of

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taking the place of the two policies issued by the other companies, and these policies instead of being canceled were kept in life, one of two results would follow, either defendant's policy would be void, or under the condition that if other insurance was effected on the same property, defendant's would only be liable *pro rata*. It is not claimed that it is void, hence the other policies were not canceled. But if it was, the objection was waived by the receipt of the premium.

As between Mrs. C. and the plaintiffs it may well be that when Mrs. C. accepted the defendant's policy as an operative instrument between her and the defendant, the plaintiffs might insist that they were entitled to the benefit of it as being made for their benefit in the case they paid in the event of loss such sum as they were liable for to her.

It seems to me the plaintiffs cannot recover on the first count in their complaint.

I am of opinion, however, that the plaintiffs are entitled to recover as assignees of Mrs. C. Notwithstanding the agent who effected the insurance with defendant was wholly unauthorized to act for her in the business with defendant, it was competent for her when it came to her knowledge to ratify the act and thus render the policy valid *ab initio*. (*Finney v. Fairhaven Ins. Co.*, 5 Metc., 192; *Thompson v. The American Tontine L. and S. Ins. Co.*, 46 N. Y., 674.)

And the ratification is sufficient if made after the happening of the loss. (*Finney v. Fairhaven Ins. Co. supra*; *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S., 485.)

It is not necessary to inquire whether the ratification would have been operative if the premium had not been paid to and received by the defendant. The fact of such payment is conceded, but the force of it is sought to be avoided, because :

1st. It was under protest ; 2d. It was offered to be returned ; 3d. Because when it was received the defendant's agents did not know that the policies issued by the other two companies had not been canceled.

It is not true that when the money was paid by Mrs. C.'s

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agent it was not known to defendant's agent that the other policies had not been canceled. That fact was known to them as early as noon of the day succeeding the fire.

The offer to return could not deprive Mrs. C. of rights which had attached when the money was paid, nor of the benefit of any inference which resulted from defendant's receipt of the money with knowledge of the non-cancellation of the other policies.

As to the payment under protest, it is affirmed on the one side and denied on the other. If it was important, it presented a question for the jury, but no request was made to submit it to the jury, and it was the province of the court under such circumstances to determine the fact, and its decision is final.

If the plaintiffs had purchased the policy in question of Mrs. C., unconnected with their liability upon the policies issued by them, I should entertain doubts whether the purchase would have been valid. But the policy was in fact procured by their agent for their benefit and protection, but in the name of Mrs. C., and for this purpose I do not doubt their right to take the policy by assignment. I intend to embrace in this proposition the receiver of the Commonwealth company.

It follows that the plaintiffs are entitled to recover one-half the amount insured by defendant's policy, and if her counsel will stipulate to reduce the verdict to that sum judgment may be entered for it, but if he shall not so stipulate the verdict is set aside and a new trial ordered, costs to abide event.

Judgment accordingly.

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JAMES MAGOVERNING, Respondent, v. ORRIN G. STAPLES and others, Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, JANUARY, 1873.)

An incorporated agricultural society may employ persons to preserve order on its grounds during a fair. (See Laws 1859, p. 63.)

It is the duty of those employed to preserve order, and they may put off from the grounds persons who persist in causing disorder, after they are requested to desist therefrom, and enforce the lawful regulations of the society, which are made known to those admitted to the grounds.

The society may place seats upon a part of its grounds, and charge an additional price for admission thereto to one holding a ticket to the grounds generally.

But its officers and police may not justify the forcible exclusion of such a person from the seats because he has not paid for their use, without charging him with knowledge of the requirement, and with refusal upon demand to pay or leave.

And a refusal of the holder of a ticket to the fair, to leave the seats will not justify his removal from the grounds to which his ticket admits him.

A custom to charge for the seats, of which the person removed is not shown to have knowledge, is not admissible as evidence in justification of his removal.

But evidence of a regulation of the society, establishing and authorizing the collection of additional charge for the seats, is material upon a question of unlawful exclusion by an officer, to show the authority for the demand of payment, &c.

Where a charge to the jury considers the testimony only on one side, and the counsel for the other side objects, without requesting a charge upon the remaining testimony, he has no benefit from the exception.

THIS was an appeal by the defendant from a judgment for the plaintiff, entered upon the verdict of a jury, at the Jefferson circuit. The facts are stated in the opinion.

*James L. Starbuck*, for the appellants.

*Moore & McCartin*, for the respondents.

Present—MULLIN, P. J., and TALCOTT, J.

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MULLIN, P. J. The Jefferson County Agricultural Society is duly incorporated, and holds an annual fair on its grounds, in the city of Watertown.

In September, 1870, it held a fair, and charged for admission to the grounds, giving to persons applying, tickets which admitted them to the grounds and to exhibit articles at the fair.

The defendant Staples was appointed, by the society or its officers, general superintendent, and as such he was authorized to enforce order on the grounds.

The defendant Stockweather was a policeman of the city, and assigned to duty on the fair grounds during the continuance of the fair.

The society erected on its grounds elevated seats for the use of spectators, and for admission to which a fee was charged. These seats were separated from the rest of the ground by a fence, having a gate in it, through which those desiring to occupy seats had to pass.

The plaintiff purchased, for himself and family, tickets, and paid for the same, admitting them to enter the grounds each day of the fair and compete for the prizes.

They entered the grounds, and, after visiting the objects of interest to them, they went to the gate in front of the seats, found it open, as they testify; found no one asking or receiving pay for occupying seats, and they were ignorant that any charge was made for the use of the seats, but on the contrary understood that the tickets, purchased on entering, entitled them to occupy the seats if they desired to do so.

They passed through the gate and occupied seats. After being seated a few minutes some person came on to the seats and ordered persons sitting thereon to get off, to leave them. Soon after Staples came to plaintiff and ordered him to get off, without assigning any reason for the requirement, or asking for pay for the use of the seats.

The plaintiff said his ticket entitled him to go on to any part of the grounds and he should not leave. Staples thereupon seized him and attempted to pull him off Plaintiff



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resisted and he (Staples) left, and in a few minutes returned with the other defendants.

In the mean time the plaintiff and his family had left the seats and were attempting to pass out of the inclosure, where they were when defendants came, and Staples ordered the others to seize plaintiff and put him off the grounds.

The plaintiff told them they need not use violence, he would go out without it; but they nevertheless seized him and dragged and pushed him out of the inclosure where the seats were, and off of the fair grounds into the highway.

The defendants testify that before any violence was attempted toward the plaintiff, and after plaintiff and his family took their seats, a person passed along and notified those accompanying them that the society charged for the use of the seats, and that those who did not pay must leave them. Staples says he called on plaintiff to pay, and if he would not requested him to leave. Plaintiff refused, using profane and abusive language, claiming the right to occupy by virtue of his ticket of admission. He then put his hand on plaintiff, using no violence, and plaintiff pushed him with some violence, and he then called the other defendants to help put him out. Plaintiff resisted, using violent and profane language; but they put him out of the inclosure and off the grounds.

The jury believed the plaintiff's version of the transaction, and found a verdict for him for fifty dollars, on which judgment was entered, and from it defendant appeals.

The agricultural society had the right to employ defendants to preserve order on the grounds during the fair, and it was the right and duty of the persons so employed to preserve order, and if persons persisted in causing disorder after request to maintain order and conform to the regulations of the society, which were made known to those admitted on the grounds, to put them off.

It was the right of the society to erect on their grounds seats for the accommodation of persons attending the fair and to charge those occupying them for their use, and to

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exclude by force if necessary all who attempted to occupy them without paying the price demanded for such use. But before they could exclude a person from the seats who had a right to enter on the grounds, it must be shown that compensation for the use was exacted, and that the occupant knew of the requirement, and with knowledge thereof, and after demand of it, he refused to pay.

These facts established, the officers of the society were justified in excluding the occupant from the seats, and from the inclosure in which they were erected. But if plaintiff took a seat without knowledge that pay was demanded for its use, and having no notice that he had no right to occupy without compensation beyond what he had paid for admission to the grounds, and without any demand of him of pay, or required to leave, he was violently removed, those who removed him were liable for the violence so used. If the plaintiff testified truthfully, such was the situation of the defendants.

But if the forcible removal of the plaintiff from the inclosure in which the seats were was justifiable, there was no justification for turning out of the grounds, for admission to which the society had been paid.

If it had been shown that the conduct of the plaintiff was such, after being removed from where the seats were, as to justify the belief that he was going to create disorder on the grounds, and it could only be prevented by his exclusion from them, his removal would have been justifiable. But no such state of things existed, as is shown by himself and his witnesses.

It is not wise nor lawful, in order to preserve order on fair grounds or in any place in which large numbers of persons are assembled, that those whose duty it is to secure it should violently assault persons who are found where the regulations of the society or building say they have no right to be except upon compliance with conditions rightfully imposed, until they are satisfied that the supposed wrong-doer is informed of the conditions and refuses to comply with them.

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The plaintiff, according to his view of the occurrence, was ignorantly occupying a seat to which he had no title. He had no means of learning his error, and was chargeable with no wrong until he was informed of his duty to pay or leave the seats. Finding that, although not intentionally guilty of any wrong, he was where he had no right to be, he tried to get away before the defendants could attack him, but could not, by reason of the crowd at the gate leading to the seats, and while he was thus trying to avoid a quarrel he was assaulted, not in a cruel and inhuman manner, but with violence.

It is unnecessary to say that if the jury had believed the version of the transaction as given by the defendants and their witnesses, the forcible removal of plaintiff from the seats was justifiable; but his removal from the grounds of the society would even in that case be wrongful.

The court below properly excluded evidence of the custom of the society to charge for the use of seats, the defendant not showing nor offering to show that the plaintiff knew of the custom, or was chargeable with knowledge of it.

It does not appear that plaintiff had ever before attended a fair of the Jefferson County Agricultural Society, or that he had lived six months in the county.

It seems to me, however, that the offer to show that the society had established a charge of fifteen cents for the use of seats, and directed the superintendent to collect the same, was improperly excluded.

It was not admissible to charge plaintiff with knowledge of the regulations or of the instructions; but it was important to the defendants' defence to show that, in demanding pay of the plaintiff for the use of the seats, they were carrying into effect the regulations and instructions of the society.

If there had been no authority to demand pay it would be difficult for defendants to find any excuse for removing the plaintiff. It lay at the very foundation of the defence.

The court charged the jury that "plaintiff was there with his family and so far as this case discloses, he went and occupied the seats in question—the gate, if there is a gate.

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then being open, no one there asking any toll as revenue or contribution from him, and he went where he found, according to the testimony, from two to three hundred persons seated. Now, in my judgment, it is rather late to claim, in the face of all this—there being no by-law to prevent him from going where he pleased—it is too late for any of the employes or authorities of that fair to say they had a right to remove him while he was thus sitting peaceably on those seats with his family, or any provocation which he gave them did not authorize him to insist upon remaining where he was." This part of the charge was excepted to by defendants' counsel.

If we assume that the plaintiff's version of the occurrence is the correct one, the charge was correct. But the trouble was, the court entirely ignored the facts sworn to on the part of the defence. Under these circumstances the counsel should have called upon the court to instruct the jury as to the rights and liabilities of the parties if they found the facts to be as sworn to by defendants' witnesses. This was not done, and the defendants can get no benefit from his exception.

The defendants' counsel excepted to the proposition in the charge that payment at the gate was sufficient to entitle the plaintiff to access to every part of the ground, including the seats.

I do not find that the court charged in the language employed by the counsel as to the right to occupy the seats. But I do not doubt the court intended so to charge.

The answer to this objection of counsel to this clause of the charge is the same as to the former part.

If the plaintiff did not know that pay was demanded for the seats, and he sat upon them without any notice that he had not a perfect right to be there, his occupancy was rightful until the society did its duty and informed the occupants that pay was demanded, and an opportunity given to pay or remove.

As the court deprived the defendants of an essential part

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of defence in excluding evidence of the regulation of the society to charge for the seats and the instruction to Staples to enforce the payment, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

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HUDSON G. WOLFE and another, Respondents, v. DAVID H. BURKE and another, Appellants.

(GENERAL TERM, SECOND DEPARTMENT, FEB. 1873.)

The employment in a trade-mark of a term, applicable in common use to a particular kind of general merchandise, cannot give any exclusive right to employ it.

Thus "schnapps," intending abroad alcoholic drink in general, and in common use here, Holland gin, may not be exclusively appropriated for trade-mark purposes.

Protection to trade-marks rests upon the principle of preventing the fraudulent appropriation of a name by which only the product or manufacture of another is designated, and of shielding the public against deception by such means. (Per GILBERT, J.)

The distinctive name given to a new commodity becomes, by use, its proper appellation, and passes as such into our language, and, excepting rights secured by patent, may be used in manufacturing and selling the article by any one. (Id.)

One cannot make a trade-mark of his name to the exclusion of a like use of it by another of the same name, the use of it by the latter being fair and unaccompanied by contrivance to deceive.

Equity will restrain one claiming an exclusive right to sell under a particular trade-mark designation, which is a mere name for a kind of general merchandise, from interference, by means of injunctions, circulars, and threats of prosecution made to customers, with the trade of another who uses the same designation.

THIS was an appeal from a judgment for the plaintiff, entered upon the decision of the court.

The plaintiffs, who were, and had been since 1871, engaged as partners in the manufacture of an article of gin which they sold in bottles labeled "Hudson G. Wolfe's Bell Schnapps," brought the action against the

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defendants, as proprietors of an article sold and labeled "Udolpho Wolfe's Aromatic Schiedam Schnapps," to restrain interference with their trade through circulars issued by the defendants to the plaintiffs' customers threatening them with prosecution if they sold the plaintiffs' article, and to prevent the defendants from restraining the plaintiffs' sale by injunction.

The plaintiffs sold their gin as designated by them, with the intent to increase their sales in view of the use by Udolpho Wolfe of the word schnapps in the sale of his article, and they advertised their article and were receiving returns from large, increasing and remunerative sales of it.

It appeared from the defendants' showing, that Udolpho Wolfe, to whose rights they had succeeded, commenced the sale of an article of gin, under the designation employed by the defendants, in 1848, and that the sale had been continued by him and by the defendants under the same name, which they marked upon bottles containing the gin and upon labels placed on them; and that the defendants' gin had been extensively advertised and known as labeled. It also appeared that before Udolpho Wolfe introduced the defendants' article to the trade in that manner, there had been no other liquor put up and sold in the same manner and with the same designation.

Sometime in the year 1872 the agents and employes of the defendants printed and circulated among the customers of the plaintiffs a circular notifying the trade that all persons purchasing or exposing for sale any article of schnapps not bearing the name of Udolpho Wolfe, would be prosecuted to the extent of the law; the defendants also threatened the plaintiffs with a suit and preliminary injunction to prevent their sales of the "Bell Schnapps." It was shown that the defendants' interference with the plaintiffs' business in these respects was injurious to it, and that a temporary injunction would have seriously damaged it.

The court found, from the evidence, that the word "schnapps" had been used here prior to 1848, in the English

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language, in Marryatt's novels and in dictionaries of the German language, and among Germans in this country speaking both English and German, to denote gin and an alcoholic drink of that class of liquors which includes gin; and that it had been so used, as a part of the English language here, before Udolpho Wolfe designated the article sold by him by that name.

The plaintiffs brought the action against the defendant Burke, and others unknown, composing Udolpho Wolfe & Co., as executors or representatives of Udolpho Wolfe, deceased. The defendants' answer alleged the incorporation of the Udolpho Wolfe Co., of which Burke was president, of which facts the plaintiffs had no knowledge prior to the answer setting them forth.

The court gave judgment for the relief demanded in the complaint.

*Winchester Britton*, for the appellants, contended that equity could not entertain an action to restrain the commencement of a suit to enjoin an alleged infringement of a trade-mark, citing *Hall v. Fisher* (1 Barb. Ch., 56); *Lehretter v. Koffman* (1 E. D. Smith, 664); *Seeback v. McDonald* (11 Abb. Pr., 95); *Bedell v. McLellan* (11 How., 172); *Bean v. Pettingill* (2 Abb. [N. S.], 58); *McGune v. Palmer* (5 Robts., 607). That the defendants, as successors of Udolpho Wolfe, were entitled to exclusive use of the word schnapps in connection with the sale of Holland gin. (*Rillet v. Carlier*, 61 Barb., 435; *McAndrews v. Bassett*, 10 Jur. [N. S.], 550; *Gout v. Aleplogn*, 6 Beavan, 69; Brown on Trade-mark, 133; *Braham v. Bustard*, 9 L. T. R. [N. S.], 199; *Coxe's Cases*, 674; *Wotherspoon v. Currie*, 5 L. R. [H. L.], 508; *Newman v. Alvord*, 49 Barb., 588; *Merserole v. Tynberg*, 36 How. Pr., 14; *Filley v. Fassett*, 41 Mo., 173; Am. Law Reg. [N. S.], 402; *Congress, &c., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y., 291.) He also cited, upon the question of resemblance in trade-mark, and presumption of damage from infringement, *Lexio v. Provegende* (L. R. 1 Ch. App.,

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196, 197); *Barden v. Sabaton* (Brown on Trade-marks, 290); *Merserole v. Tynberg* (36 How., 14); *Burnett v. Phalon*, (Am. T. M. Cases, 384); *Taylor v. Carpenter* (2 Sandf. Ch., 603); *Braham v. Bustard* (9 Law Terms [N. S.], 199); *Hemming v. Miller* (Chan. Rep., 447). He also contended that defendants were entitled to protection on the ground of an unfair and fraudulent competition in trade, and cited *Woodward v. Lazar* (21 Cal., 448); *Howard v. Henriques* (3 Sandf. S. C., 725); Brown's T. M., 65; *McCardle v. Peck* (28 How., 120); *Marsh v. Billings* (7 Cush., 322); *Howe v. Searing* (10 Abb., 264); *Christy v. Murphy* (12 How., 77). Also, that the relief granted the plaintiff was too broad, citing *Corwin v. Daly* (7 Bosw., 225); *Lee v. Haley* (5 E. L. R. [Chan. App.], 155).

*E. Moore*, for the respondents, upon the question of the right of plaintiff to use his own name in the trade-mark combination, cited *Howe v. Howe Machine Co.* (50 Barb., 236); *Faber v. Faber* (3 Abb. [N. S.], 115); *Comstock v. Moore* (18 How. Pr., 421); *Croft v. Day* (7 Beavan, 84); *Clarke v. Clarke* (25 Barb., 76); *Burgiss v. Burgiss* (17 Jurist, 292); *Candee v. Deese* (54 Ill., 439). Upon the right of the plaintiffs' to the use of the word schnapps, he cited *Candee v. Deese* (54 Ill., 439); *Stokes v. Landgraff* (17 Barb., 608); *Amoskeag Man. Co. v. Spear* (2 Sandf., 609); *Burgess v. Burgess* (17 Eng. L. & Eq., 257); *Town v. Stetson* (5 Abb. [N. S.], 218); *Rillet v. Carlier*, 11 id.; *Merserole v. Tynberg* (4 id., 410); *Newman v. Alvord* (49 Barb., 588); *Corwin v. Daly* (7 Bosw., 222); *Bininger v. Wattles* (28 How., 206); *Wolfe v. Goulard* (18 How. Pr., 64); *Andrews v. Bassett* (10 Jurist, 550); *Gout v. Aleplogn* (6 Beavan, 69); *Knott v. Morgan* (2 Keene, 213); *Phalon v. Wright* (Phil. Com. Pleas, 311); *Cox Amer. T. M. Cases*, 470); *Partridge v. Mencks* (1 How. App. Cases, 558); *Am. L. C. Co. v. Am. L. C. Co.* (11 Jurist, part 1, N. S.). Upon the question of jurisdiction, he cited *Erie R. R. Co. v. Ramsey* (45 N. Y., 637); 2 Abb. Dig., "Equity," 557, 555, §§ 74, 75).



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Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The parties respectively manufacture in Holland and sell in this country an article of gin, called “schnapps.” That word is of German derivation. As used in Germany and in Holland, it signifies a dram or drink of some alcoholic beverage. It has, however, become an English word by common use and adoption, and means Holland gin. It is so defined in Webster’s dictionary. The evidence shows, and the court below has found, that the word was used in this country in that sense, or at least in a sense which includes the definition of Webster, long before any appropriation of it by the defendants.

Have the defendants a right to an exclusive use of the word “schnapps,” as forming a part of the combination which constitutes their trade-mark? We are of opinion that they have not, for the reason that it is a true generic designation of merchandise by its mercantile name, and does not denote a specific product of any one. The popular use and signification of such words cannot be monopolized, for that would fetter the growth and improvement of our language. Any one has a right to sell goods by a name in common use, and which does not of itself suggest that the thing is sold or manufactured by another exclusively. The protection afforded to trade-marks rests upon the principle of preventing a fraudulent appropriation of a name by which only the product or manufacture of another is designated, and of shielding the public against deception by such means. It is apparent that the word “schnapps” conveys only the idea of a particular kind of alcoholic beverage. Everybody is at liberty to manufacture and sell it as his own product. If it is sold as “schnapps” of his own manufacture, nobody can be deceived. The gin manufactured by the defendants is sold under the name of “Wolfe’s Aromatic Schiedam Schnapps.” That manufactured by the plaintiffs is sold under the name of “Wolfe’s Bell Schnapps.” The word “schnapps,” in both cases, denotes merely the nature of the commodity sold. It performs pre-

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cisely the same office, and no other, as the old English words having the same meaning, for example, the word "gin" or "beverage" or "drink." To give the defendants a monopoly of the use of such a word would be to strike it from the nomenclature of commerce. No rule of law or equity has gone as far as this. On the contrary, all the authorities, as I read them, allow the unrestricted use, in selling merchandise, of words which merely define truly the thing sold. A monopoly of the sale of the thing itself can be obtained only by means of a government patent. If the commodity be a new one, it must necessarily have an appropriate and distinctive name, and that name, no matter when or by whom imposed, becomes by use its proper appellation and passes as such into our common language. If it has not been patented, any one has a right to manufacture and sell it. Having this right, he must necessarily have the right to designate it by the name by which it is distinguished and known, if he sells it fairly as an article of his own manufacture and not that of another.

The evidence falls short of showing that the plaintiffs' trade-mark is a fraudulent or deceptive imitation of that of the defendants, or that it is calculated to deceive anybody, or that anybody has in fact been deceived thereby. On the contrary, the evidence leads to quite an opposite conclusion. The plaintiffs have the right to use the name of Wolfe, because it is a part of their firm name, and is the surname of the head of the firm. A man cannot make a trade-mark of his name, to the exclusion of a like use of it by another who bears the same name, if the use by the latter is fair and unaccompanied by any contrivance to deceive. (See cases cited in Browne's Law of Trade-marks, § 431, *et seq.*) In the case before us, no such contrivance has been resorted to, but quite the contrary. No doubt the use of the words "Wolfe" and "Schnapps" has facilitated competition with the defendants, but, for the reasons stated, such competition cannot legally be deemed fraudulent or unfair.

We have no doubt of the jurisdiction of the court. The acts complained of were, in their nature, extremely injurious

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to the plaintiff, and were not susceptible of an adequate remedy at law. It is not the sole object of this suit to prevent the bringing of a suit by the defendants, but to restrain the repetition of acts akin to a continuous slander of the plaintiffs' title. In such a case a perpetual injunction is the appropriate and only adequate mode of redress. The court having acquired jurisdiction for this purpose, may retain it for all purposes.

The judgment should be slightly modified, so as to restrain the defendants, in appropriate terms, only from instituting suits which would re-open the questions determined in this suit. So modified, it should be affirmed, with costs.

Ordered accordingly.

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SIGISMUND HOFHEIMER and ors., Respondents, v. PATRICK CAMPBELL, Sheriff, &c., Appellant.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

In an action to charge a sheriff, upon a recovery by the plaintiff as defendant in *replevin*, the complaint averring that the sureties failed to justify and no new sureties were furnished (Code, § 210), and "that the defendant became liable therefor," no denial of the averment being made and no question of liability by reason of the failure of the sureties to justify raised below, it seems the defendant's liability on that ground is conceded.

If the sureties turn out insufficient, the sheriff is liable under section 210 of the Code, in like manner as they are.

Failure of the sureties to justify is satisfactory evidence in an action against the sheriff that they were not qualified, and notwithstanding their affidavit to the contrary attached to the undertaking.

Accordingly, if on exception to their sufficiency the sureties fail to justify, are not accepted, and new ones are not furnished, the sheriff is liable for moneys recovered with the property by the defendant in replevin.

An agreement to discharge the sheriff from liability for non-justification of the sureties, upon his delivery to the defendant of the property replevined, is illegal and void.

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THIS was an appeal by the defendant from a judgment entered against him upon the verdict of a jury, under direction of the court.

The plaintiff sued, as assignee, to recover from the defendant, as sheriff of Kings county, a sum of money to which his assignor was entitled, upon a judgment in his favor as defendant in an action for the recovery of personal property.

The complaint averred that one Hager had brought an action for possession of the property against the plaintiff's assignor, and upon receiving the affidavit and undertaking required in such case by chap. 2, title 2, of the Code, that the defendant had taken the property from the possession of the plaintiff's assignor and delivered to the latter a copy of the undertaking, with his (the defendant's) approval indorsed; that the plaintiff's assignor had at the proper time excepted to the sufficiency of the sureties and served notice of the exception upon the defendant, and that the sureties had failed to justify, and that no new sureties had been furnished; that the plaintiff's assignor did not accept the sureties offered, and thereupon that the defendant became liable; that judgment was rendered in the action for return of the property to the plaintiff's assignor or for the value thereof in case a return could not be had, and for costs, \$312.94; that execution had been issued against Hager, the plaintiff in the action, which remained wholly unsatisfied and the above amount unpaid; that demand had been made on the defendant therefor and payment refused. The complaint referred to the affidavits and undertaking, which were annexed, and were in usual form in such case, the undertaking being conditioned in the sum of \$5,000.

The defendant's answer did not deny the allegation to the effect that upon failure of the justification of the sureties the defendant became liable, and it specifically admitted all the other allegations of the complaint, and set up for a further answer that the defendant had detained the property in his hands at request of the plaintiff's assignor, and thereafter delivered it up to him; that it was agreed between the defendant as

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sheriff and plaintiff's assignor that the surrender and delivery was to be in full discharge and exoneration of the defendant as sheriff from all liability incurred by him as sheriff, by reason of the failure of the sureties to justify. Upon the trial the defendant opened the case to the jury, as holding the affirmative, and the court, upon motion of the plaintiff, directed a verdict for plaintiff upon the opening.

. *James Troy*, for the appellants. Section 210 of the Code does not render the sheriff liable as bail on failure of the sureties to justify. He is only responsible in the event that the bail are *insufficient*. The case is different from bail on arrest, where the notice is "*that he does not accept the bail*" (Code, § 192), and where on their failure to justify "*the sheriff shall himself be liable as bail*" (§ 201), and where in the event of his becoming liable the bail are made liable to him. (§ 203.) Here the notice is a mere *exception* to the sureties, and the sheriff is only made "responsible for the sufficiency of the sureties." The distinction is marked and not the result of accident. The omission of the same words in provisions following each other so closely shows intention and design. The sheriff standing as a mere surety, plaintiff must exhaust his remedy against the bail and establish their insufficiency before he can maintain the action.

The defendant, if liable as bail, had the rights of bail, and might divest himself of his liability by agreement with him to whom he was liable. As bail he held the property as indemnity for his liability, and might agree with him to whom he was liable to transfer the security.

*A. W. Parker*, for the respondents. The agreement was unlawful. (3 R. S., 5th ed., 476, § 59; Laws 1801, chap. 28, § 13; *Dive v. Manningham*, 1 Plowden, 67; *Bogardus v. Trinity Church*, 4 Paige, 198; *Love v. Palmer*, 7 John., 160; *Reed v. Pruyn*, 7 id., 426; *Strong v. Tompkins*, 8 id., 98; *Sullivan v. Alexander*, 19 id., 233; *Bank of Orange County v. Wakeman*, 1 Cow., 47; *Webber's Ex'rs v. Blunt*, 19

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Wend., 191; *Bank of Buffalo v. Boughton*, 21 id., 58; *Barnard v. Viele*, 21 id., 88; *People v. Meighan*, 1 Hill, 298; *Winters v. Kinney*, 1 N. Y., 367.)

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. No question appears to have been made in the court below that the defendant had become liable by reason of the failure to justify of the sureties approved by him, and we think it cannot be raised here for the first time. The complaint avers that the sureties failed to justify, and no new sureties were furnished, and that the “defendant became liable therefor.” This allegation, not having been denied, stands admitted. If the counsel for the defendant intended to raise any question as to the liability of the sheriff on this ground, he should have called the attention of the court to it, so that an opportunity might have been afforded the plaintiff for obviating the objection by evidence. Not having done so, the objection is not available on appeal. But we think that the facts that the sureties failed to justify and were not accepted, and that no new sureties were furnished, of themselves established the liability of the sheriff. Pecuniary responsibility is not the only subject involved in the question of the sufficiency of the sureties. The statute (Code, § 210) requires that they shall justify in like manner as upon bail on arrest. If they do not justify they are not sufficient. In order to justify they must possess the qualifications prescribed in the case of bail on arrest (Code, § 213), among which are being a resident and householder or freeholder within the State, as well as being worth the requisite amount. The failure to justify furnishes satisfactory evidence that the sureties did not possess either of these qualifications; and their affidavit attached to the undertaking is not legal evidence to the contrary. It was the duty of the sheriff to take none but sufficient sureties. Having omitted this duty the statute makes him responsible for their sufficiency. The obvious meaning of this language is that if

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the sureties turn out to be insufficient, the sheriff shall be liable, in like manner as the sureties; for the omission to take sufficient sureties makes him a *quasi* trespasser. When the sureties do not justify it is not necessary to sue them in order to establish their insufficiency.

The agreement set up in the answer constituted no defence. If it was exacted or taken by the sheriff, upon a delivery of the property before judgment, it operated directly as an indemnity against a violation of the sheriff's duty; for he had no right to deliver the property to Beamish before judgment, except by virtue of section 211 of the Code. If it was exacted or taken upon a delivery of the property after the judgment in favor of Beamish it was illegal, because it was the duty of the sheriff to return the property unconditionally. In either case, therefore, the taking of the agreement was in violation of the sheriff's duty, and, consequently, was illegal and void.

The judgment should be affirmed, with costs.

Judgment affirmed.

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### HENRY REINMILLER v. EDWIN T. SKIDMORE and another.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

It seems an affidavit, on application for an attachment to a justice of the peace, showing grounds under the Revised Statutes and also under the act of 1831 (chap. 300, § 30, &c.), will authorize its issue under either.

And when a summons has been taken out against the defendant in the attachment, and the subsequent proceedings are in conformity with the act of 1831, that it may be presumed to have issued under that act, and although it contains a recital that it is issued upon proof that the defendant is about to depart, &c.

If the justice approves the bond it will uphold his jurisdiction against a stranger to the proceedings. *e. g.*, a lessor of the property levied on, not party thereto, notwithstanding a mistake in the condition, *e. g.*, an omission to provide for the payment of all moneys received from the property levied on, over and above, &c.

Reversal of the judgment in the action on which execution has issued

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against the attached property does not, it seems, invalidate the levy or sale, or make either the party or officer a trespasser.

It merely annuls the title acquired through the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come.

One holding a chattel for a time, *e. g.*, a year, paying monthly sums for a particular use and no other, and prohibited from selling or loaning, is not a lessee, but mere licensee, having no interest liable to an attachment against his property.

THIS was a motion upon a case and exceptions for judgment on the verdict of a jury ordered to be heard in the first instance at General Term.

The plaintiff sued to recover the possession or value of a baker's wagon, which he had let to one Faust, a baker, by written instrument, for one year, at a monthly rent of ten dollars, payable on the first day of each month, and containing also the following provisions: "The use of said wagon is only for his baker business, and not for any other use. The party of the second part is not allowed to sell said wagon or to make a loan of the same."

It appeared that Faust was indebted for goods sold and delivered to the defendant Skidmore, who applied to a justice of the peace at Newburgh, Orange county, for an attachment, under the provisions of the several statutes of the State, against Faust's property, upon his own affidavit and that of one Bull, his clerk, from which it appeared that the claim arising on contract, as mentioned, was for forty-two dollars, and that the application was made on the ground that Faust was about to depart from the county of Orange, where he resided, with intent to defraud his creditors. The affidavit also set forth facts showing that Faust was secretly causing his property to be removed from that county, and had abandoned his home and place of business, and kept himself concealed, with like intent, *viz.*, to defraud Skidmore and other creditors.

The justice took and approved of a bond in the penalty of \$100, given by Skidmore and another, conditioned for the payment of all damages and costs by reason of the issuing of the attachment if he (Skidmore) should fail to recover judg-



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ment, and also conditioned that if Faust should recover, Skidmore would pay all moneys which should be received by him (Skidmore) from any property levied upon under an attachment, over and above the amount of the judgment and interest and costs thereon, and an attachment issued to Roche, a constable, the other defendant here, reciting that "whereas Edwin T. Skidmore hath applied for an attachment against the property of F. Faust, against whom he hath a claim for goods sold, arising on contract, \$42.02, and produced satisfactory proof that the said F. Faust is about to depart the county of Orange with intent to defraud his creditors," and commanded any constable, &c., to attach so much of the goods, &c.

By virtue of this attachment Roche levied on the baker's wagon, then in the possession of Faust, who held under the written instrument, a year not having elapsed from its execution and delivery to him.

A summons was afterward issued to Faust in favor of Skidmore, and judgment went against him by default in Skidmore's favor. Execution was issued upon the judgment, and the wagon, then being in the constable's hands, was sold by him and possession delivered to the purchaser.

Faust afterward appealed from the judgment rendered against him by the justice, and it was reversed.

The plaintiff demanded possession of the wagon from Roche while he held it under the attachment, and brought this suit after expiration of the term for which Faust was entitled to it.

*John Miller*, for the plaintiff.

*Fullerton & Anthony*, for the defendant.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The affidavit was sufficient to authorize an attachment to be issued, pursuant to either the

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Reinmiller v. Skidmore.

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Revised Statutes or the act of 1831. (2 R. S., 230, § 26; Laws of 1831, § 34.) Under the former statute, an attachment may issue, on proof that the debtor is about to depart from the county, while the proof required by the latter is confined to acts of the debtor, relating to his property. The affidavit contains all that is required by both statutes, but it might be inferred, if it was material, that the attachment was issued under the act of 1831, because a summons was taken out against the defendant in the attachment, and the subsequent proceedings were in conformity with that act.

The bond given was in the penalty required by the act of 1831, and although a mistake was made in the condition of it, yet it was approved by the justice, and as against the plaintiff, a stranger to the proceeding, it ought to be held sufficient to uphold his jurisdiction. (*Bascom v. Smith*, 31 N. Y., 595.) The defendant in the attachment might have waived the defect, and that seems to be the test, whether it was a nullity or a mere irregularity. (*Clapp v. Graves*, 26 N. Y., 418.)

We think the return of the constable was a substantial compliance with the statute.

Parol evidence of the execution and of the sale thereunder, was admitted without objection. It is too late now to raise that objection.

The cases of *Hull v. Carnly* (1 Kern., 501; S. C., 17 N. Y., 202), and the authorities therein cited, are decisive of the right to sell the interest of a lessee of a chattel, by virtue of an execution against him, and to deliver possession of the chattel pursuant to the sale, as was done in this case. Nor does a reversal of the judgment on which the execution issued, in such a case, invalidate the levy or sale, or make either the party or the officer a trespasser. It merely annuls the title acquired by means of the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come.

If, therefore, the interest of Faust in the chattel had been that of lessee, as all parties have assumed, the defendant would have been entitled to judgment. But it was not such

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an interest. The instrument of hiring provided that "the use of said wagon" should be "only for his baker business, and not for any other use," and prohibited a sale or loan of the wagon. The legal effect of the instrument was to confer upon Faust merely a personal license to use the wagon. Such an interest cannot be the subject of sale under an execution. For this reason the plaintiff is entitled to judgment.

Judgment accordingly.

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FRANCIS H. DUFF, Respondent, v. THOMAS H. GARDNER  
Executor, &c., Appellant.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

One entered into a sealed contract for street repairs with a municipal corporation, then took a partner, with whom he performed the work in part and agreed to share the profits, but, before completing it, died, and his executor finished it.

*Held*, in an action by the surviving partner, that he could not recover at law for the moneys due on the contract or any part of them.

*Held*, further, the corporation having paid the money into court, and procured a substitution of the deceased partner's executor, as defendant, that the latter was entitled to judgment for the amount due.

And it seems the executor would be bound to fulfill the contract, on decease of the contractor, and entitled in equity to receive the price of work done after his testator's decease.

THIS was an appeal by the defendant, from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought by the plaintiff, claiming as the surviving partner of John F. Barrett, deceased, against the city of Brooklyn, to recover for work, labor and services rendered the city, under a contract made by it with Barrett, for the care and repairing of its streets. The city paid the money claimed into court, and obtained a substitution of the defendant Gardner as executor of Barrett, under section 122 of the Code.

It was found by the referee that on March 25, 1865, Barrett

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entered into a contract of partnership with the plaintiff, and they agreed to co-operate with each other as partners in the work of repairing streets in Brooklyn, which Barrett had on the 15th of March, 1865, contracted with the city to perform; also in the performance of job work for the city and for others, and they agreed to contribute equally toward expenses, and share equally the profit and loss of their business. In pursuance of their partnership agreement, the partners performed work under the contract of Barrett with the city, as therein provided for. Barrett died November 4, 1865, after performance of a part of the work, leaving a will, of which the defendant was appointed and qualified as executor. The executor finished the work. The plaintiff had judgment for the amount claimed in his complaint, being the full amount due from the city upon the contract and paid into court by the city.

*D. P. Barnard*, for the appellant.

*John H. Bergen*, for the respondent.

Present—BARNARD, P. J.; GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. An action at law by the plaintiff upon the contract with the city will not lie. The contract was under seal, and was made with Barrett alone. The plaintiff was not named in it. Where such a contract is entered into with one partner, he alone can sue upon it. (Lindley on Part., 385; Coll. on Part., Perk. ed., § 652, *et seq.*); Story on Part., § 244; *Robson v. Drummond*, 2 Barn. & Adol., 303.)

Assuming, then, that there was a *bona fide* agreement of partnership between the plaintiff and Barrett (a fact which, to say the least, the evidence leaves in very great doubt), yet the contract with the city existed before the partnership, and the plaintiff can take no benefit from it except in the mode in which the contract was made. (*Lucas v. De la Cour*, 1

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M. & S., 249.) No act of the partners could have enabled them to maintain a joint suit at law against the city without the consent of the latter. Consequently the plaintiff, as surviving partner, has no cause of action. (See *Gould v. Gould*, 6 Wend., 265.) The only person to whom the city was liable was Barrett. The defendant has succeeded to his rights, and is legally entitled to the money brought into court.

No facts are stated in the complaint, nor was any evidence given upon the trial creating any right in equity to a recovery of any part of the money by the plaintiff. Nor could the equitable remedy, if there be one, enable the plaintiff to receive more than his share of the money after deducting the advances made by the defendant. The alleged partnership terminated at the death of Barrett. The defendant, as executor of his estate, was legally bound to fulfill the contract, and is entitled, therefore, in the same capacity to payment for all work done after the death of Barrett. It is not necessary, however, to consider the equitable rights of the parties, for this is an action at law, and not a suit in equity, and the case affords no means of determining those rights.

The judgment must be reversed and a new trial granted at circuit, costs to abide the event.

Judgment accordingly.

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NATHANIEL H. FOWLER and others, Appellants, v. MENTHEIM  
LOWENSTEIN, Respondent.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

A plaintiff's attorney received money on an *ex parte* order, in proceedings supplementary, from one owing the judgment debtor, having knowledge of a claim for the same money, and of a suit pending thereon against the person upon whom the order was made, but without disclosing these facts to the judge; the person owing had been examined and admitted the indebtedness, and the judgment debtor swore that he had owed, not that he did owe him. Judgment was recovered by the claimant, and the defendants moved against the attorney for repayment. *Held*, on appeal, that the motion was rightly granted.

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*Held*, also, that the suppression of the facts as mentioned was an imposition upon the justice who granted the order, and that restitution was proper on that ground, and, against an attorney, would be enforced by attachment.

The attorney having stated that he had paid over the moneys to the plaintiffs in his action, he being himself one of them,—*Held*, that it was no defence.

Nor was it a defence that the proceedings were taken for the benefit of plaintiff's assignee, no claim of payment to the assignee being made.

THIS was an appeal from an order directing the plaintiff Fowler to repay certain money which he had received upon an order of a justice of this court, or that an attachment issue, &c.

The facts which were brought before the court by affidavits were substantially these :

The plaintiff Fowler and the other members of a firm in which he was partner recovered judgment against Lowenstein and the other defendants for some \$800. Proceedings supplementary to execution were taken upon the judgment, and a receiver of the property of Lowenstein was appointed therein in April, 1867.

In October, 1869, the plaintiffs instituted proceedings supplementary upon the same judgment, and examined therein one Thomas A. Wilmerding, of the firm of Wilmerdings & Mount, who testified that there remained in the hands of his firm to the credit of Lowenstein a balance of \$963. The affidavit of the plaintiff also stated that on the examination of the judgment debtor in these proceedings he testified that Wilmerdings & Mount had owed him the sum named.

Fowler thereupon made a motion to one of the judges of this court and obtained an order upon Wilmerdings & Mount for the payment to him upon the judgment of the funds in their hand, credited to Lowenstein forthwith. Upon this order Wilmerdings & Mount paid the money to Fowler.

One Bernard Rice also sued Wilmerdings & Mount, claiming to be entitled to the money paid over to Fowler as the assignee of Lowenstein. Of this suit, which was after the recovery of the Fowler judgment and of the appointment of

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Fowler v. Lowenstein.

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a receiver in the proceedings taken thereon, Fowler had knowledge, and he had served notice of the appointment of a receiver upon the defendants therein, and was alleged to have encouraged a defence therein upon the ground that the appointment of a receiver had been made prior to the assignment. Thomas A. Wilmerding had no personal knowledge of the Rice suit against his firm when examined upon the second supplementary proceedings, and in obtaining the order for payment to him by Wilmerdings & Mount, Fowler did not disclose the pendency of the Rice suit or that a receiver had been appointed in prior proceedings.

Judgment went in favor of Rice as assignee, in his suit, notwithstanding defence was made upon the ground of a receivership prior to the assignment.

The plaintiff alleged an assignment of the Fowler judgment to one Bamberger, but stated in his affidavits that except his fees he had paid over to plaintiffs. The court granted the motion.

*A. H. Reavey*, for the appellant.

*C. B. Smith*, for the respondent.

Present BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. It is testified by the attorney of Messrs. Wilmerdings & Mount, and not denied by Mr. Fowler, that when the latter obtained the moneys in controversy, he knew the fact that said moneys were claimed by Mr. Rice, and that an action brought by him against Wilmerdings & Mount to recover the same was then pending. There is nothing in the papers to show that Mr. Fowler had any reason to question the title of Mr. Rice to the moneys. On the contrary, it is a fact of some significance, that it is not made to appear that Lowenstein, the judgment debtor, on his examination, stated that the moneys belonged to him. That examination is not before us, and all that appears respecting the

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contents of it is set forth in Mr. Fowler's affidavit, dated October 23d, 1871. His statement there is, "that on the examination of the judgment debtor he stated and swore that the relators (Messrs. W. & M.) *had* owed him the money in question." The title of Mr. Rice to the moneys has been judicially established.

Mr. Fowler obtained the moneys upon an *ex parte* deposition of Thomas A. Wilmerding, that there was a balance of \$936.86 remaining with his firm to the credit of the judgment debtor. Mr. Wilmerding was not interrogated respecting the claim of Rice, or whether such balance was in point of fact the property of the judgment debtor. Nor did Mr. Fowler state to the justice who made the order directing Wilmerdings & Mount to pay the money to him, the fact that the judgment debtor had assigned said moneys to Rice, or anything concerning Rice's claim thereto. Nothing is shown to justify or excuse such a suppression of material facts. As the case is now presented, it can be regarded in no other aspect than that of an imposition on the justice who made the order. In such a case there can be no question of the power and duty of the court, by appropriate means to compel a restitution of the moneys to the persons thus illegally deprived of them. (*State v. Phenix Bank*, 33 N. Y., 25, and cases cited.) And when the party proceeded against is an attorney, the remedy by attachment is the proper one.

No embarrassment arises from the statement of Mr. Fowler, that he has paid over the moneys to the plaintiffs. Nor is it necessary to pass upon the legal effect of such a fact, if it exists, for Mr. Fowler is one of the plaintiffs, and the statement would be literally true if he retained the moneys and charged himself therewith in account with his firm. It appears that one Bamberger is the person entitled to receive the moneys from Fowler, and there is no pretence that they have been paid to him.



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**Bass v. White.**

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The appeal from the order made by Justice INGRAHAM was waived by the motion under review.

Upon the whole case, therefore, we think the order appealed from should be affirmed, with costs.

Order affirmed.

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ALBERT G. BASS, Respondent, v. JOHN WHITE et al.,  
Appellants.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

On a contract for sale and shipment of coal for cash, to be paid on receipt of bill of lading, the defendant shipped the coal and sent the bill of lading to and requested payment of the plaintiff, who claimed an offset and offered the balance, which being refused, he offered his check for the full amount, it being after bank hours this was also refused, and next day he tendered the cash. *Held*, that the plaintiff was in default, and the defendant discharged from the contract.

Otherwise, if plaintiff had asked time to obtain funds for his check, in such case he should have had a reasonable time.

THIS action was brought to recover damages for an alleged failure of the defendants to deliver 200 tons of coal. The contract was made in July, 1868, for 400 tons of coal, deliverable at Fort Trumbull or Fort Adams, at the price of four dollars per ton, free on board at the place of shipment, with freight added; the plaintiff to pay for the coal and freight on receipt of bill of lading.

In October the plaintiff directed the shipment of the coal, and ordered the bill of lading to be filled out, requiring the delivery at Fort Trumbull. The coal was accordingly shipped, and a few days after, on Saturday at half-past two o'clock, P. M., the bill of lading was tendered to the plaintiff at his office, and payment required, but shortly after twelve o'clock noon on the same day the defendants had sent the bill of lading to the plaintiff's office, but the messenger having called three times, did not find the plaintiff until half-past two o'clock.

The plaintiff at first declined to pay the bill, there being, as he claimed, another account due to him from the defend-

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ants; he subsequently on the same day (Saturday) went to the defendants' office and offered to give a check for the bill, which they refused to receive, as it was then after banking hours, and they professed to have had protested checks of the plaintiff's, and they refused to give the plaintiff the coal unless payment was made as required by the contract.

The following Monday morning the plaintiff tendered the money for the coal, and demanded the bill of lading, which was refused; he then brought this action to recover the difference between the contract price and the value of coal in October.

The jury rendered a verdict for \$500. The defendants moved for a new trial on the minutes, which was denied *pro forma*, and thereupon appealed from the order and from the judgment.

*Goodrich & Wheeler*, for the appellants.

*James Troy*, for the respondent.

Present—BARNARD, P. J.; GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The contract in this case is clear and unambiguous. It was made in New York. By it the defendants sold to the plaintiff 400 tons of coal, to be delivered either at Fort Trumbull, New London, or at Fort Adams, Newport, during the then season of navigation, and the plaintiff agreed to pay cash for the coal on receipt of the bill of lading. Two hundred tons of this coal had been delivered to the plaintiff, and paid for before the transaction in controversy arose. With respect to the remaining 200 tons, it appears that the plaintiff gave to the defendants an order for the shipment of the coal to Fort Trumbull, and it was shipped accordingly. The defendants then sent the bill of lading of this coal to the plaintiff and asked him to pay the price. The plaintiff told the messenger that there was some money due him on account from the defendants, and asked to have that deducted from the price of the coal, offering to pay the difference. This being declined by the messenger, the plaintiff afterward, and on the same day, made a similar offer

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to the defendants personally. The defendants in reply required payment of the whole amount of the bill, as a condition of letting the plaintiff have the coal. The plaintiff then offered the defendants his check for that amount, which they declined to receive, and they also refused to receive the check with the indorsement of a Mr. Talmage upon it.

These facts substantially are testified to by the plaintiff himself. The rule of law arising out of them is not doubtful. It was the duty of the plaintiff to pay cash for the coal on a tender of the bill of lading. If at the time of such tender he had not the money in hand, but had it elsewhere, the law would, upon his request, afford him a reasonable time to obtain the money. If, therefore, upon the defendants' refusal to take the check, the plaintiff had asked for time to get the cash upon the check, and the defendants had refused to give the time, a different question would have been presented. But the plaintiff made no such request. The defendants were under no obligation to take the check or anything else in lieu of money. (1 Den., *infra*.) Nor were they under an obligation to take it and deliver the coal on any other day than when the bill of lading was tendered. The plaintiff was clearly in default, therefore, in not paying for the coal upon a tender of the bill of lading, and that tender, and the failure of the plaintiff to pay, discharged the defendants from the obligations of the contract. The subsequent tender of the price and demand of the coal by the plaintiff was a nullity, for he had by his own previous breach of the contract terminated his rights under it, and given the defendants a right of action against him for any damages they might have sustained in consequence of such breach. (Story on Sales, §§ 413 and 415; *Leven v. Smith*, 1 Den., 571; *Startup v. McDonald*, 6 M. & G., 593; *Des Arts v. Leggett*, 16 N. Y., 584.) Upon the undisputed facts of the case, the defendants were entitled to the verdict.

The judgment must be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

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Bryan v. Baldwin.

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MARY D. BRYAN, Executrix, &c., Respondent, v. DANIEL A. BALDWIN, Appellant.

(GENERAL TERM, FIRST DEPARTMENT, JUNE, 1872.)

A pledgee who purchases the pledge at public sale is not chargeable with conversion.

If the purchase is invalid, the relations of pledgor and pledgee are unchanged.

Where stock, pledged as collateral to a note, due at a certain day, with authority to sell on default, was sold by direction of the pledgee, and purchased by him, at public auction, after two days' written notice of the time and place had been left, in the absence of the pledgor, at his office, with a person in charge thereof:

*Held*, that the pledgee became legally vested with the title and the pledgor could not offset the actual value of the stock against the pledgee's claim for the balance of the note.

The opinion of SHAW, J., in *Granite Bank v. Ayers* (16 Pick., 392) upon the sufficiency of the notice of sale approved and followed.

THIS was an appeal by the defendant from a judgment for the plaintiff, entered upon the decision of a judge at Special Term.

The action was brought by plaintiff as indorsee to recover a balance claimed upon a promissory note, which was set forth in the complaint as follows, viz.:

"\$7,266.95.

NEW YORK, August 24th, 1866.

"On or before the fifteenth day of November next I promise to pay Silas M. Stilwell, or order, \$7,266.95, for value received, with interest at the rate of seven per cent per annum, having deposited with him as collateral security (with authority to sell the same on the non-performance of this promise) 2,000 shares of the capital stock of the New York Guano Company.

"D. A. BALDWIN."

The complaint also alleged sale, upon default in payment of the note and due notice of time and place, of the stock for \$1,928.50 on the 9th May, 1867, and demanded judgment for the balance of the note.

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The answer denied notice of the sale, and alleged that it had been wrongfully and unlawfully made on the day mentioned in the complaint without demand of payment of the note or notice to redeem the stocks, or notice of the time and place of sale.

It also set up as a counter-claim that the value of the stock was much greater than the sum realized upon its sale, and claimed judgment for that sum less the amount of the note, and denied any existing indebtedness on the note, and also denied that any part of the note had been paid. The plaintiff replied, denying the counter-claim.

It appeared that the plaintiff, through his attorney, on the 7th May, 1867, caused a notice to be left at the office of the defendant, in the latter's absence, by a person in charge, by a clerk who had not been able to find the defendant there upon several attempts to do so. The notice was as follows:

"D. A. BALDWIN, Esq.: *Dear Sir.*—The stock of the New York Guano Company, which I hold as collateral to your note, will be sold on the 9th inst. by A. H. Nicolay, at 111 Broadway, Exchange Salesroom, as per annexed advertisement.

"Yours, etc.,

E. SPROUT."

Accompanying the notice was served at the same time an advertisement of the sales of Nicolay as auctioneer, and signed by him, for the day named in the notice, which included the stock in question; but the defendant swore that he had no recollection of receiving the notice, and the court found that he had no personal notice.

The plaintiff also proved by the attorney that the defendant had been informed previously that his stock would be sold if the note was not paid.

The sale was made pursuant to the notice and the stock was purchased by the plaintiff, as alleged in the complaint.

The court found that the note had not been paid nor any part of it, and that the collateral security had not been converted by the plaintiff, and gave judgment for the face of the note and interest, and costs.

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Bryan v. Baldwin.

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*H. M. Ruggles*, for the appellant.

*E. Sprout*, for the respondent.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. We agree with the court below, that the evidence did not make out a conversion of the stock. If the sale was ineffectual to change the title to the stock, such title remained vested as it was before the sale. The court acted on the assumption that the sale was made without notice to the defendant. If this assumption had been correct, the sale would have been a nullity, unless the defendant afterward ratified it. The defendant, however, denies the validity of the sale, and so in effect repudiates the transaction, while at the same time he seeks to make the plaintiff liable for a conversion of the stock, by means of that sale. This he cannot do. The law will not permit a party thus to blow hot and cold. If the defendant had a right to disavow the sale, his election to do so rendered it inoperative, and the stock would thenceforth be held by the plaintiff, upon the terms of the original deposit, viz., as security for the payment of the defendant's indebtedness. When that should be paid, the defendant would be entitled to a return of the stock.

But we are of opinion that the sale was in all respects regular, and that thereby the title to the stock became legally vested in the plaintiff. The only objection taken against the validity of the sale rests upon the allegation that the defendant was not properly notified thereof. The evidence uncontradicted is, that a formal written notice of the sale, with a copy of the advertisement thereof annexed, signed by the auctioneer by whom the sale was made, was left at the place of business of the defendant, with a person in charge thereof, two days before the sale. The defendant testified that he had no recollection of having received the notice. This may have been owing to his own act. Whether it was or not, the notice ought to be held sufficient, in the absence of any proof, creat-

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Siegel v. Gould.

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ing an obligation on the plaintiff to adopt another manner of service. A notice of the dishonor of a promissory note, left at the dwelling or place of business of the indorser, is sufficient to charge the latter (1 Pars. on Notes, chap. 12, § 3) upon the principle that if the person to whom the note is addressed is absent, it is to be presumed that he will leave some person charged with the care of his business, or at least some one between whom and himself there is a privity or confidence. (*Granite Bank v. Ayers*, 16 Pick., 392.) In the case cited, SHAW, Ch. J., lays down the rule that "all notices at one's domicile, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be good constructive notice, and to have the legal effect of actual notice."

No argument is needed to show that such a rule is approved by good sense, and indeed is founded in commercial necessity. If the defendant left no one at his place of business to attend to his affairs, it is and ought to be his own loss.

The judgment should be affirmed, with costs.

Judgment affirmed.

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JOHN SIEGEL and another, Respondents, v. SEABURY S. GOULD,  
Appellant.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

Real estate brokers, employed as middle-men, to bring purchasers together to enable them to make their own bargain, may charge commissions to both parties.

They are not agents to buy and sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller.

THIS was an appeal from a judgment for the plaintiffs, entered on the report of a referee. The action was brought to recover broker's commissions for finding the defendant a purchaser of his real estate.

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*Siegel v. Gould.*

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It appeared that the plaintiffs were real estate brokers in New York city, and prior to October 20, 1870, were entrusted by the defendants, for sale or exchange, with certain real estate, and requested to find a purchaser for the same, with a promise to pay commissions at two and a half per cent, on the price obtained, for the plaintiffs' services upon a sale or exchange.

The plaintiffs having undertaken to perform the services, found and introduced to the defendant one Martin as purchaser, with whom the defendant entered into negotiations for an exchange, which were continued until the 20th October, 1870, when he entered into a contract with Martin at the plaintiffs' office to exchange part of the property put into plaintiffs' hands for other property of Martin's, the estimated value obtained for the property exchanged being \$103,000.

The plaintiffs, prior to the exchange, had obtained from Martin a promise to pay them a commission of one and three-fourths per cent on the valuation of his property which should be taken by the defendant in the exchange. On the 22d November, 1870, the defendant and Martin agreed to abandon and cancel the contract for exchange, and the contract was canceled.

The referee reported in favor of the plaintiffs for their commissions at the rate agreed.

*Charles H. Mundy*, for the appellant.

*Jordan & Whitney*, for the respondents.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. According to the finding of the referee, the nature of the defendant's employment of the plaintiffs was that of mere brokers, in the strict signification of that term, and not that of agents to make a sale on his behalf. The evidence sustains this view of the relations between the parties. The defendant agreed to pay the plain-



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tiffs for that service. The service having been rendered pursuant to the agreement, we are unable to perceive any legal objection to a recovery by the plaintiffs. The fact that Martin, the purchaser of the defendant's property, also agreed to pay the plaintiffs for their services to him, creates no such obstacle. Both contracts being founded on a legal consideration, each is valid.

The case would have been quite different if the plaintiffs had been employed as agents of the defendant to buy or sell. They would then have been incapacitated from acting for Martin in the transaction without the assent of the defendant. Such conflicting relations are repugnant to the fundamental principle on which the law of agency rests, and are forbidden by law. But the plaintiffs were not such agents. They were employed as middlemen only, to bring the parties together to enable them to make their own contracts. They so acted with the knowledge of both parties. In such a case a broker is not an agent for either party to buy or sell, but stands indifferent between them. There is no conflict of duty in the case. He does not make himself an adverse party to either principal, nor does either of them repose any special trust or confidence in him.

The distinction has often been recognized and approved, and we think rests on sound reason. (Paley Agency, 12; Story Agency, § 31; *Rupp v. Samson*, 16 Gray, 398; *Redfield v. Tegg*, 38 N. Y., 212.) The judgment, therefore, must be affirmed, with costs.

Judgment affirmed.

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Clark v. Warren.

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GEORGE P. CLARK, Appellant, v. IRA D. WARREN,  
Respondent.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

Proceedings under attachment (Code, § 237) are ineffectual to reach a debt, due on account to the defendant in the action, where the sheriff fails to give notice, of the levy, to the debtor.

A chose in action is incapable of seizure by the sheriff.

It seems a chose in action is excepted from sale by subdivision 2, § 237, Code.

THIS was an appeal from a judgment upon a verdict rendered for the defendant under direction of the court, and from an order denying a new trial.

The plaintiff sued as the purchaser at sheriff's sale of an account for moneys expended and advanced by the firm of Robinson & Ogden for the defendant.

It appeared that the plaintiff had brought an action against Robinson & Ogden to recover for certain securities which they had appropriated to their own use, as custodians for him, and obtained an attachment against their property, under which the sheriff seized their stock, books and papers. Judgment was recovered in the action and execution issued to the sheriff; and after six months from the docketing of the judgment, upon petition, in the action, of the plaintiff and affidavit of the sheriff setting forth all his proceedings since service of the attachment, &c.; also that he had used due diligence and endeavored to collect the evidences of debt attached, &c., &c. (Code, § 237, sub. 4), and upon notice to the defendant's attorney, the court ordered a sale by the sheriff of the notes, accounts, books of account, and evidences of debt, seized under the attachment, at public auction in the usual manner of sales of personal property by the sheriff under execution. Pursuant to this order the sheriff, among other things, sold the debt due by the defendant to Robinson & Ogden; it was purchased by the plaintiff. It appeared that no notice was given of the attachment by the sheriff to the defendant.

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Vanneman v. Powers.

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*Nelson Cross*, for the appellant.

*Ira D. Warren* (in person), for the respondent.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The judgment below must be affirmed. The proceedings under the attachment were ineffectual to reach the debt due from Mr. Warren to the defendant in the attachment, for the reason that the sheriff did not serve upon him any notice showing that he had levied on such debt. That debt was a mere chose in action, and incapable of seizure by the sheriff. (Code, §§ 235, 236; *Orser v. Grossman*, 11 How., 520; *Clark v. Goodridge*, 41 N. Y., 210; *Ransom v. Minor*, 3 Sand. S. C. R., 692.)

We think, also, the sale by the sheriff of the debt was illegal. Code, § 237, sub. 2, expressly excepts choses in action from property that may be sold, and subdivision 5 provides in what manner they shall be made applicable to the payment of the judgment recovered by the creditor in the attachment, namely, by requiring the sheriff to collect the same and apply the proceeds to the payment of the judgment.

Judgment affirmed.

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CHARLES P. VANNEMAN, Respondent, v. MILLIE D. POWERS,  
Appellant, impleaded, &c.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

The plaintiff was induced by fraudulent representations to make a contract to exchange his land for other land, and a mortgage, of little value compared with amount secured, at its face. On the day for consummating the contract it appeared that the wife of the defrauder held the mortgage as assignee, though evidence was given to show that she held it for her husband's benefit. The wife was present and the plaintiff's deed was made, by her suggestion, to her. She executed the assignment, joined in her husband's conveyance, and the plaintiff gave notes to her order for interest due on liens on the land conveyed to her by him. *Held*, that the evidence warranted a verdict against the wife for damages as an active party to the fraud.

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Vanneman v. Powers.

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A tender of reconveyance to the plaintiff, without offer of the notes, *held*, not a rescission of the contract, although made after receipt of a letter from plaintiff reciting the fraud and proposing, in general terms, a settlement. Such a letter was not an overture for rescission of the contract. *Held*, further, that the wife was liable in damages under the rule that the representations of an agent are, in law, those of the principal.

THIS was an appeal by the defendant, Millie D. Powers, wife of her co-defendant, upon a case and exceptions from a judgment rendered for plaintiff upon a verdict.

The action was brought to recover damages for false and fraudulent representations which had induced the plaintiff to exchange certain lands for other lands and a bond and mortgage.

The plaintiff proved that in May, 1869, he was the owner of a farm of twelve acres of land in New Jersey, with buildings and improvements upon it, which he valued in all at \$21,000, of which value \$14,000 was covered by mortgages to that amount, leaving to the plaintiff \$7,000 as the value of his equity. This farm he placed in the hands of one Jaques, a broker in real estate, for sale or exchange, and was afterward introduced by Jaques, at the latter's office in New York, to Edward J. Powers, the defendant, who represented that he owned a first bond and mortgage for the sum of \$5,000 on ninety-eight acres of land in Middlesex county, New Jersey, known as the Robert Griffith farm. On the same day, the plaintiff took Powers and the broker to his property, and, after examination of it, Powers offered in exchange for it the bond and mortgage on the so-called Griffith farm and 120 acres of land in Iowa, and made representations to the plaintiff that the interest on the bond and mortgage had always been paid promptly when or soon after due. That Griffith, the mortgagor, was an old contractor of responsibility and ability to pay, who resided at Staten Island, and that the farm which the mortgage covered was worth \$9,200, and had on it good buildings and fences. Without examining into the truth of the statement or visiting the premises, but relying on the representations of Powers, although the property was not

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Vanneman v. Powers.

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known to him or to his broker, the plaintiff agreed to make the exchange, and he made a written memorandum to that effect, which he delivered to Powers.

On the 9th June, when the papers were to be exchanged, the plaintiff met Powers and his wife, the appellant, by appointment, at the office of Jaques, and the memorandum was carried out satisfactorily by the plaintiff's conveyance, of the property as agreed, to the wife, which conveyance was so made to her upon her own suggestion, and also by the plaintiffs giving his two notes, payable to the order of the wife, to Powers, for interest which had accrued on the \$14,000 liens on his own property; these notes were for \$150 and \$800 respectively. The Griffith mortgage named in the memorandum proved to be held by the wife as assignee, and was a purchase-money mortgage, originally given to her by Griffith on a sale of the property covered by it to him. Mrs. Powers assigned it to the plaintiff, and also joined with her husband in conveying the Iowa land to the plaintiff.

There was default in the first payment of interest on the \$5,000 mortgage assigned to the plaintiff, which led to inquiry, and resulted in the discovery of the falsity of the representations made to the plaintiff by Powers.

Griffith turned out to be worthless and irresponsible, and the farm upon which the \$5,000 mortgage was secured was of but trifling value, estimated at from five to six dollars per acre.

The mortgage, after it had been given to Mrs. Powers originally, which was in October, 1859, had been assigned by her to one Lawrence, who died, and whose executors sold it at auction, when it was purchased by Powers, and an assignment taken in the name of his wife, and his testimony was that she held it for his benefit, to which there was no direct contradiction other than the assignment to her individually. The reassignment to Mrs. Powers by the Lawrence executors was in 1867, but the mortgage bore indorsements purporting to be signed by Mrs. Powers, though in fact signed in her name by her husband, of receipts for eighteen different semi-annual

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payments of the interest, and these receipts were shown to have been made by Powers at one time. The representations made by Powers to the plaintiff were in the main shown to have been without any foundation, and fraudulently made. The plaintiff paid the larger note, but the smaller remained unpaid.

Prior to the commencement of the action the plaintiff's attorney wrote a letter to Mrs. Powers, in which he stated that he had not been successful in seeing her at her house, on calling for the purpose of giving her an opportunity to restore to his client that which had been fraudulently taken from him; that the plaintiff had made a full statement of the facts of the case to him; and, referring to the transaction as fraudulent, informed her that he desired to save her expense, and to give her an opportunity to restore to the plaintiff an equivalent to that which she had taken from him, and, giving a time until which he would delay proceedings, requested her to seek an interview with him at his office before the time.

Mrs. Powers had at that time conveyed the property covered by the plaintiff's deed to her, subject to the mortgages thereon, as security for a loan of some \$300, but she caused a tender of a deed from her grantee to be made to the plaintiff after the receipt of this letter and before suit, and a demand of the \$5,000 mortgage and reconveyance of the Iowa land. The plaintiff referred the parties to his attorney, and there was evidence tending to show that he had absolutely refused to rescind the contract.

*A. R. Dyett*, for the appellant.

*Nelson Cross*, for the respondent.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The appeal being from the judgment, we are precluded from a review of the facts further than to see that they are sufficient to warrant the verdict

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of the jury. Upon this subject we think a strong case was made in favor of the plaintiff. The action was for damages sustained in consequence of fraudulent representations. That the plaintiff was defrauded was clearly proved, and the evidence, we think, was sufficient to warrant the conclusion that Mrs. Powers was an active party to the fraud. She was, therefore, liable, irrespective of the question of the agency of her husband. Being privy to his fraudulent representations, she was equally liable as if those representations had been made with her own mouth. The case was submitted to the jury in that view, and they evidently were satisfied that Mrs. Powers was guilty of the fraud. We do not see how they could have reached any other conclusion. The letter of Mr. Barowsky cannot be considered an overture for a rescission of the contract, which was the subject of the fraud, nor was any rescission accomplished, because Mrs. Powers did not offer to return the notes. If there had been an offer to rescind, and it had been accepted and carried out by the defendant, there might be ground for holding that the parties had settled the matter by way of accord and satisfaction. But the evidence falls short of that. The plaintiff was, therefore, entitled to retain his bargain and recover the damages which he had sustained by means of the fraud. If the foregoing views are correct, none of the defendant's exceptions are tenable.

We are also of opinion that Mrs. Powers was liable in damages for the fraud of her husband, on the ground that the representations of an agent are in law the representations of the principal. In respect of the liability of a principal for the acts of his agent done in the course of the agent's employment and for the benefit of the principal, no sensible distinction can be drawn between the case of fraud and any other wrong. For what difference can it make to the person defrauded whether the principal sends an agent to cheat him, or does it himself?

The judgment must, therefore, be affirmed, with costs.

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Bliss v. Swartz.

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GEORGE BLISS and others, Respondents, v. MOSES H. SWARTZ,  
Appellant.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

The respective agents of the plaintiff and defendant agreed, on their behalf, that the defendant should pay a part of his indebtedness to the plaintiff in satisfaction of the whole, partly in cash, partly in the defendant's note. The note of defendant was given, and the defendant's agent gave the draft of his (the agent's) firm, drawn on N. Y. in favor of the plaintiffs, in payment of the cash. *Held*, that the taking of the draft of the agent's firm in part payment was a sufficient consideration for the discharge of the claim, and an action to recover the balance was not maintainable.

*Held*, further, that the giving of this firm draft by the agent could not be regarded as payment of the money of his principal, but was presumptively to advance the funds of his firm.

THIS was an appeal from a judgment upon the decision of the court.

The plaintiffs sued to recover a balance of an account. The defendant denied all indebtedness. The court gave judgment for the plaintiffs for the balance claimed, having found payments on the original indebtedness, in cash and by return of goods upon the amount thereof, of something over \$2,000. The court also found as follows, viz. :

Early in May, 1868, Egleson P. Clegg, of Galveston, Texas, on behalf of the defendant, called upon the plaintiffs in the city of New York, and applied to them to accept a composition for their claim against the defendant, informing them that the composition had been or was about to be effected with all his, the defendant's, other creditors. The plaintiff Bliss replied that they would not then accept the proposition.

On or about May 14, 1868, Mr. Clegg had a second interview in reference to the composition with the plaintiff Bliss, when he said that the whole matter was in the hands of Mr. Philip W. Kopper, who was then in Texas; and that whatever he did in reference to compromising their claim



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against the defendant would be acceptable to the plaintiffs, and that the plaintiff Bliss would do nothing about a compromise in New York.

Mr. Clegg immediately telegraphed the substance of this conversation to his partner, Mr. George Butler, at Galveston, Texas. Subsequently and on June 3, 1868, at Mr. Butler's office in Galveston, Philip W. Kopper for the plaintiffs agreed upon a settlement of their claim against the defendant, which had been reduced by payments on account of the note to \$3,659.55, including interest, upon the following terms, viz.: Twenty-five per cent, half cash and half in his note at twelve months; and, in addition thereto, \$250 cash added to the cash payment, and fifty dollars added to the note; the cash payment amounted to \$707.44; and, to carry out the settlement, Mr. Butler gave Kopper his draft of his own firm in favor of the plaintiffs for \$629.25, being the amount of the cash payment, \$690.44, to be made on the settlement, less the commissions of his firm. The note of the defendant had been previously placed in the hands of Mr. Butler's firm for collection. The draft of Mr. Butler's firm was drawn on Duncan, Sherman & Co., and was subsequently paid by them. Mr. Butler also delivered to Kopper the note of the defendant, which was for \$507.44, at twelve months, and which was paid at maturity by Mr. Butler's firm for the defendant. Mr. Butler, in this transaction, acted for the defendant.

Kopper thereupon gave a receipt to the defendant (his brother acting for him in the transaction), dated June 3, 1868, in full settlement of all claims of the plaintiffs, and surrendered the original note to him.

All that Kopper did in the transaction was authorized by the plaintiffs.

*Jno. E. Parsons*, for the appellant.

*G. A. Seizas*, for the respondents.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

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Bliss v. Swartz

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By the Court—GILBERT, J. Good faith and fair dealing require that the settlement made by the parties in this case should be upheld, if it can be done consistently with established rules of law.

It cannot be questioned that payment of a portion of a liquidated demand, in the same manner as the debtor was legally bound to pay the whole thereof, although received in satisfaction of the debt, is payment only in part; and that the agreement to receive such part payment in satisfaction is, in effect, one, to give up the residue of the demand, which, being without consideration, is *nudum pactum* and void. A contrary rule, leaving the matter to the agreement of the parties, would have been a better one; but the law is so settled, and we are not at liberty to change it. But a debtor may offer anything as a substitute for the money due, whether of less or greater value; and if the creditor take it in satisfaction it is a valid agreement, and the debt is discharged. He may give a chattel worth only one dollar in satisfaction of a debt of a thousand dollars. The obligation of a third person for any amount operates in the same way to discharge the debt. These principles are familiar and well settled. (1 Smith Lead. Ca. [444], note to *Cumber v. Wane*.) Applying them to this case, it appears that the parties, through their agents, agreed upon a compromise at Galveston, Texas, whereby the defendant was to pay twenty-five cents on the dollar, and \$300 in addition. Two hundred and fifty dollars was to be paid in cash, and the balance, payable under the agreement of compromise, was to be paid half in cash and half in a note of the defendant at twelve months. The defendant was not present when this compromise was effected; but it was accomplished by Mr. Butler, a member of a firm to whom the plaintiffs had sent their demand against the defendant for collection, and who appears to have acted for both parties in this transaction. The negotiation was had with an agent of the plaintiffs specially appointed for the purpose. Mr. Butler gave the plaintiffs' agent his draft on Duncan, Sherman & Co., of New York, for the amount of

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the cash payment, after deducting therefrom some commissions due his firm, and the defendant's note for the balance was delivered as agreed; and thereupon the plaintiffs' agent signed a paper acknowledging the receipt of the sum named in the draft and the note, and stating that "the same was in full settlement of their claims against" the defendant. The compromise agreed upon, therefore, was not literally carried out; but the plaintiffs varied the agreement by taking a negotiable draft, drawn by third persons, payable in New York, instead of cash at Galveston. If the agreement in terms had been that the plaintiffs should receive this draft in satisfaction of their demand against the defendant, there can be no doubt that the subsequent receipt of the draft, in pursuance of the agreement, would have discharged the debt. (*Boyd v. Hitchcock*, 20 J. R., 76, approved 33 N. Y. R., 653; *Sibree v. Tripp*, 15 M. & W., 23.) Such, we think, was, in substance and legal effect, the transaction under consideration, with the exception (which does not affect the principle) that the defendant's note was received in addition to the draft. There is no basis for the presumption on which the court below seems to have acted, namely, that the giving the draft by Mr. Butler was only a mode of applying the defendant's money in performing the agreement of compromise. On the contrary, the presumption, arising from the legal effect of the transaction, is that Mr. Butler advanced to the defendant the funds belonging to his firm; and this presumption could be overcome only by evidence to the contrary.

The case, briefly stated, is that the defendants received a negotiable bill of exchange of third persons for a part of the defendants' debt, and defendants' note for another portion, and in consideration thereof discharged the whole debt.

We are of opinion that this was a sufficient consideration to uphold the discharge; and that, for the error of the court below in holding otherwise, there must be a new trial.

This conclusion makes it unnecessary to decide whether

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the transaction ought to be upheld as a valid discharge on the ground that it formed part of the general compromise which the defendant effected with his creditors.

New trial granted, with costs to abide the event.

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WILLIAM H. STILES et al., Respondent, v. ISAIAS MEYER, impleaded, &c., Appellants.

(GENERAL TERM, FIRST DEPARTMENT, JUNE 1872).

Upon the representation of one of the partners that M. was to be taken into the firm of J. L. B. & Co. at a certain day, in which representations M. joined, the plaintiffs sold and delivered goods for the new firm, to be paid for after the day named; the new firm was not formed, and notice of this fact was not given to the plaintiffs, who, after the day, took the note of J. L. B. & Co. for the goods. *Held*, that M. was jointly liable with the partners for the goods.

In an action to recover against M., the plaintiffs might prove what the statement was, on the faith of which the goods were sold.

THIS was an appeal by the defendant from a judgment for the plaintiff, entered on the report of a referee.

The plaintiffs sued upon a promissory note made to them in the firm name of Jacob L. Bach & Co., and their complaint also contained a count in assumpsit against the defendants as joint purchasers of goods. The defendant, Bach, made default but Meyer answered.

The referee found that on and prior to the 18th of February, 1866, and from thence until after the second of April following, the defendants, other than said Meyer, were in partnership under the name of "Jacob L. Bach & Co.," and prior to said eighteenth of February had dealt largely with the plaintiffs in purchasing goods from them. On the eighteenth day of February Meyer and J. L. Bach called together at the store of the plaintiffs and there stated in substance to the plaintiffs that Meyer was to be a member of the firm of Jacob L. Bach & Co. on the first of April then following and afterwards, and that Meyer was to pu:

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in the new firm \$50,000, and that they then wished to buy goods of the plaintiffs for the new firm. They then jointly purchased of the plaintiffs goods to the amount of \$1,827.49 for the contemplated new firm, payable four months from April 2d, 1866, which goods, before that date, the plaintiffs, in consequence of their reliance on these statements, delivered to Jacob L. Bach, as one of the members of said contemplated firm, and shortly after that day received the note set forth in the complaint in this action as the note of the new firm.

The plaintiffs never received any notice that the proposed partnership had not and would not be carried out until after their delivery of the goods and after their receipt of the note.

In the summer following, and before the maturity of said note, the old firm of Jacob L. Bach & Co. failed.

Meyer and J. L. Bach & Co. in fact intended to enter into such partnership, and Meyer to put in as capital \$50,000 when such representations were made, and until after 2d of April, 1866. But shortly after that day this intention was abandoned on account of the inability of Jacob L. Bach to put in as much capital as he had promised, and his wishing to put in old stock at cost, and the partnership was never in fact made or formed. The referee gave judgment for the plaintiff.

*E. A. Doolittle & Wm. Fullerton*, for the appellant.

*Amos G. Hull*, for the respondents.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The referee has found as matter of fact, upon evidence which is conflicting, that the note in suit was taken by the plaintiffs as the note of the firm of J. L. Bach & Co., of which they supposed the defendant, Meyer, was a member; that the consideration of the note was

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goods sold to such firm; that on the occasion when the goods were sold Meyer and Bach stated that Meyer was to be a member of said firm in about six weeks; that they then wished to buy goods of the plaintiffs for said new firm; that they jointly purchased the goods for which the note in suit was given for said contemplated new firm; that said partnership was not in fact formed, but that no notice of that fact was given the plaintiffs until after the delivery of the goods and the receipt of the note. It would be a violation of a settled rule to disturb the finding of a referee upon a question of fact when there is so much evidence to support it as in this case. It must, therefore, be held conclusive.

The question is, whether the facts found establish a legal liability against Meyer. We think they do, for the reason that the defendant was a party to the contract of purchase of the goods. The credit was given to the individuals who were to become members of the proposed partnership, and this was done with the express assent of the defendant. Although, therefore, the agreement was that the partnership should not commence until some time after the purchase, and the agreement was never carried out, yet the purchase was itself a *quasi* partnership transaction; and having been expressly sanctioned by Meyer, he is estopped from disputing his liability. (*Dickinson v. Valpy*, 10 B. & C., 128; *Battle v. Lewis*, 1 Mann. & Gr., 155; *Lake v. Duke of Argyle*, 6 Q. B., 477; *Fox v. Clifton*, 6 Bing., 776; *Burns v. Rowland*, 40 Barb., 368.)

It was certainly competent to prove what the statement was, on the faith of which the goods were sold. The exception to this evidence is not good. We are unable to perceive any materiality in the evidence respecting what had been done by the plaintiffs in limiting their terms of credit. But if the evidence was erroneously admitted, it would have no effect upon the judgment. The error, therefore, was a harmless one. (*People v. Gonzalez*, 35 N. Y., 59.)

The judgment should be affirmed, with costs.

Judgment affirmed.

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Howell v. Mills.

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JOHN G. HOWELL, Respondent, v. EDWIN MILLS and WILLIAM MILLS, Appellants.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

An objection in partition, that the complaint does not aver that the plaintiff is in possession of the premises, is too late when first made on appeal after judgment; and, it seems, although no possession should be proved. It seems the objection should be taken by demurrer or answer.

Constructive possession as the tenant in common of an undivided share of the premises is sufficient possession to support the action.

Where there is actual possession by the tenant for life, it may be maintained between the remainder-men in fee; and this is so where the remainder in fee is liable to be divested for the benefit of the survivors, upon the death of one.

The estate of a tenant for life, in possession, was sold under a mortgage of it. A remainder-man in fee brought partition against his co-tenant (an infant) in the remainder, which was liable to be divested by the death of either, without issue, for the benefit of the other, and joined the purchaser as a party, against whom there was judgment by default. A decree was made for sale, payment of the value of the life estate in gross, and investment of the balance for the benefit of the remainder-men, and payment of the income and principal according to their rights and interests. On appeal by the defendants the decree was affirmed.

Devise to tenant for life, remainder over to testator's two children; if one died without issue, survivor to take the whole. *Held*, that each child took a vested remainder in fee, subject to be divested by his death without issue.

THIS was an appeal by the defendants, Edwin Mills and William M. Hurtin, an infant, from a judgment in partition, entered by order of the court at Special Term.

The premises were situated in Orange county, and were devised by William Hurtin, who owned them in his lifetime, in his will, as follows:

"And first I give and bequeath unto my son, Alfred D. Hurtin, the farm on which I now live during his natural life, and also the piece and parcel of land which I took from William D. Hurtin's farm adjoining the widow Hill as above mentioned. At his death I give and bequeath to his two sons, George Walter Hurtin and William Mills Hurtin, for

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them and their heirs forever, the piece of ground adjoining the widow Hill as above mentioned. But if one dies without leaving any child or children, the surviving brother to have the whole of all the land above mentioned, for himself and his heirs, forever."

Upon the decease of William Hurtin, in 1858, Alfred D. Hurtin, the devisee for life, entered into possession, and continued in possession at the entry of the decree. In October, 1861, however, he executed and delivered a mortgage of all his right, title and interest in the premises, and in January, 1861, the same was sold under the power of sale therein, and was purchased by the defendant, Edwin Mills, to whom it was conveyed by sheriff's deed.

The action was brought by George W. Hurtin, one of the sons of Alfred D. Hurtin, against Mills, the purchaser of the life estate, and William W. Hurtin, an infant, his brother. John E. Howell was, after the decree and in August, 1872, substituted as plaintiff. A guardian *ad litem* was appointed for the infant, who put in a general answer, submitting the infant's rights to the protection of the court; the other defendant made default.

A decree was entered declaring the respective rights of the parties, and directing a sale of the premises, and, among other things, further directing the payment to the defendant, Mills, of a sum in gross, in full satisfaction of his interest as purchaser of the life estate of Alfred D. Hurtin, to be calculated upon the principles applicable to life estates under the rules and practice of the court, and also directing a payment of the balance of the proceeds of the sale to the Orange county treasurer, to be invested for the benefit of the then plaintiff, George W. Hurtin, and the defendant, Hurtin, the interest to be paid annually to them in equal portions during their joint lives, and on decease of either, without issue surviving him, the whole principal to be paid over to the survivor; and in case either should die leaving issue surviving him, then the principal to be equally divided between the survivor and the issue of the deceased, the issue taking one moiety and the survivor the



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other. From the judgment entered the defendants appealed in May, 1872.

*G. O. Hulse*, for the appellants.

*Sharpe & Winfield*, for the respondent.

Present—GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. The complaint contains no averment that the plaintiff was in possession of the premises sought to be partitioned. Neither of the defendants interposed a demurrer on this ground, nor was the objection taken at Special Term in any form. We think it cannot be presented here for the first time. This certainly is the general rule. (*Pope v. Dinmore*, 29 Barb., 367; *Carley v. Wilkins*, 6 id., 558.) The statute evidently contemplates that the objection should be taken by the defendants by demurrer or answer (2 R. S., 320, §§ 16 to 25; Code, §§ 144, 147, 148, 448); and when it is not so taken, the judgment must conclude the parties. (*Blakely v. Calder*, 15 N. Y., 617; *Horton v McCoy*, 47 id., 24.)

But if that judgment were properly before us for review, we should be of opinion that the objection that the plaintiff was not in the actual possession of the premises, but that they were in the actual occupancy of the life tenant, is not a good one.

The statute does not require a *pedis possessio*. It is enough that the plaintiff has a present estate as tenant in common or joint tenant, and is constructively in possession of an undivided share or interest in the premises. (*Burhans v. Burhans*, 2 Barb. Ch. R., 408; *Jenkins v. Van Schaack*, 3 Paige, 242.) The object of the revisers in reporting this statute was to exclude a party from instituting a suit for the partition of premises held adversely to him. As reported by them, the statute required an actual possession, but the legislature struck out the word "actual." From this fact, it is reasonable to

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infer that they intended that a constructive possession of the plaintiff should be sufficient. (*Beebee v. Griffing*, 14 N. Y., 238.)

This court did indeed hold in *Brownell v. Brownell* (19 Wend., 370) that when the plaintiff had only an interest in remainder, the suit could not be maintained. But that case was decided before the amendatory act of 1847 was passed. (2 Laws of 1847, 587.) In the case of *Blakely v. Calder* (13 How., 476), which arose since the act of 1847, it was held by this court that an existing admitted life estate, although covering the whole premises, does not prevent the remainder-man from being deemed "in possession" within the meaning of the law.

The judgment in that case was affirmed by the Court of Appeals (15 N. Y., *ubi sup.*) upon another ground, but at the same time a strong expression in favor of the position of this court, upon the question under consideration, was given. The decision in *Blakely v. Calder* accords with our own views of the law, and, being the latest one which we have been able to find bearing directly upon the point, must govern us in the disposition of this case. (See also Laws of 1852, 411.)

The estate of the plaintiff, George Walter Hurtin, we think was a vested remainder in fee, subject to be divested by his death without issue. (*Williamson v. Field*, 2 Sand. Ch. R., 533, and cases cited.) The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. (2 Cruise Dig., 270.) We have looked into the authorities cited on behalf of the appellant, but none of them appear to us to conflict with the conclusions we have expressed.

The judgment must, therefore, be affirmed, with costs.

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Stuyvesant Bank v. National Mechanics' Banking Association.

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THE STUYVESANT BANK v. THE NATIONAL MECHANICS' BANK  
ING ASSOCIATION.

(GENERAL TERM, FIRST DEPARTMENT, JUNE, 1872.)

In the New York Clearing House Association, checks received for clearance are credited to the sender and charged to the drawee. Their validity is not open to dispute there, but must be settled by the parties, who are to receive and return disputed checks on the same day to the sender, who must reimburse the drawee. Whether checks paid through the clearing house and charged by the drawee to his customer are paid within the rule which charges a drawee with the responsibility of mistaking his drawer's signature, *quere*.

But held that repayment by the sender of checks so paid is a waiver of the rule.

So, also, does it waive delay of the drawee beyond the day in returning the check.

Nor is a repayment induced by threat to discontinue exchanges void for coercion.

The M. and M. Bank, a member of the clearing house, and agent there for the plaintiff, which was not, received from the latter on different days several forged checks taken on deposit from the forger. The M. and M. Bank credited the checks to the plaintiff and sent them to the clearing house, where the M. and M. Bank was credited, and the defendant, the drawee, another member of the clearing house, charged with them. The defendant, without noticing the absence of a private mark understood between them, charged the checks as received from the clearing house to the supposed drawers. On receipt of the last check, several days after the receipt of the others, the defendant discovered the forgery, and on the same day tendered the checks and demanded payment of them from the M. and M. Bank, which referred it to the plaintiff. The plaintiff had meanwhile paid the forger's drafts to the amount of the checks deposited, and refused to pay. The M. and M. Bank then gave the defendant its own check for the last of the forged checks, and the defendant sent the remaining forged checks with the M. and M. Bank's check through the clearing house to the M. and M. Bank. The latter, complying with the clearing house rules, paid them all and charged the amounts to the plaintiff's account, and sent the latter the four forged checks. The plaintiff retained the checks and tendered them, the next day, to the defendant and demanded payment and was refused. Some twenty days after, the plaintiff sent them by its agent, the M. and M. Bank, through the clearing house to the defendant, which paid them and directly returned them through the clearing house to the M. and M. Bank, with

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notice that if they were sent back through the clearing house it would discontinue its exchanges with the M. and M. Bank. The latter bank returned and charged the checks to the plaintiff. The plaintiff, as assignee of the M. and M. Bank, sued to recover the amount of the checks.

*Held*, that the M. and M. Bank had waived its right, if any, to insist upon the acts of the defendant as payment of a forged check by the drawee, and had affirmed the acts of the defendant in obtaining repayment.

That the waiver was not void for coercion.

That having received the checks and passed them to the plaintiff's credit in its ordinary account, the M. and M. Bank became actual owner of the checks and was rightly treated as principal; but *held*, also, that if not rightly so treated it might not, as agent of the plaintiff, refund to the defendant without actual authority.

*Held*, further, that the plaintiff having given authority to the M. and M. Bank to act for it under the clearing house rules, which required it to act as principal, the plaintiff was bound as to third parties by the acts, as principal, of the M. and M. Bank.

THIS was a motion for a new trial upon a case made and exceptions ordered to be heard in the first instance at the General Term.

The plaintiff claimed to recover for moneys, which it alleged were inequitably and illegally withheld from it, as the assignee of the Manufacturers' and Merchants' Bank of New York city, by the defendant.

It appeared upon the trial that the plaintiff, an incorporated bank of New York city, received on deposit on the 28th and 29th of June, and 1st and 2d July, 1867, four different checks, one on each day, and respectively bearing date on the day preceding that of their respective deposits. The checks purported to be drawn by White, Morris & Co., a well known firm of bankers in the city, upon the defendant, the National Mechanics' Banking Association, and were made payable to the order of one Definganiere, also known as a merchant in the city, in whose name they purported to be indorsed, and to whose credit they were deposited.

The plaintiff was not a member of the New York Clearing House Association, but employed one of its members, the Manufacturers' and Merchants' Bank, to send its exchanges

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through the clearing house; and the course of business was for the plaintiff to put up its checks and vouchers, demandable at banking houses in the city, in packages, with slips indicating the amount of each separate item, and to send them, so put up, to the Manufacturers' and Merchants' Bank. The latter bank gave credit for the gross amount to the plaintiff and made up a new slip, incorporating that of the plaintiff, which it sent with the package and its own exchanges to the clearing house. The plaintiff kept a regular account with the Manufacturers' and Merchants' Bank, and the latter rendered a daily account and sent its vouchers to the plaintiff.

On the days upon which respectively the plaintiff received the checks for the deposit and credit of the supposed indorsee it forwarded them in the usual manner to the Manufacturers' and Merchants' Bank, where it received credit for the several amounts of the checks, in the aggregate for \$10,546.18; and from whence the checks were sent to the clearing house in the usual manner. At the clearing house the checks were charged to the defendant, and the amount of them was allowed to the Manufacturers' and Merchants' Bank.

It also appeared that the defendant was a member of the Clearing House Association, and that the business of that association was carried on under a written constitution and code of rules, by which each of its members agreed to be bound; that it was provided by one of the rules as follows: "Section 14. Errors in exchanges and claims arising from the return of checks, or from any other cause, are to be adjusted directly between the banks who are parties to them, and not through the clearing house; the association being in no way responsible in respect to them;" and by another: "Section 15. \* \* \* All checks, drafts, notes or other items in the exchanges returned as 'not good' or missent shall be returned the same day directly to the bank from which they were received; and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing house for the said checks, drafts, notes or other items so returned to it in specie or legal tender

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notes;" and, for neglect to comply with these rules, the delinquent member of the association was liable to expulsion.

The firm of White, Morris & Co., which was a depositor with the defendant, had notified the defendant of a private mark which would be placed upon the checks of that firm; and the understanding was that checks not so marked should be returned for examination and marking to W., M. & Co. The checks in question did not bear or purport to bear the mark agreed on; but when they were presented to the defendant, through the clearing house, they were received and charged to the account of W., M. & Co. On the 3d July, when the last of the four checks came in to the defendant, it was discovered that the name of White, Morris & Co. had been forged; and it was subsequently ascertained that the name of Definganiere, the indorsee and supposed depositor, had been also assumed and forged by the real depositor.

On the same day of the discovery of the forgery of White, Morris & Co.'s signature, the defendant sent its messenger with all the forged checks to the Manufacturers' and Merchants' Bank and demanded payment of them. The messenger was there directed to ask payment of the plaintiff, with the promise, by the Manufacturers' and Merchants' Bank, of payment of the last check, in case of the plaintiff's refusal. The plaintiff had at that time cashed drafts of the supposed Definganiere, its depositor, to the full amount of the four forged checks, and refused payment; and the Manufacturers' and Merchants' Bank gave its check for the last of the checks, viz., the one which had been returned to it on the day of presentation at the clearing house.

The defendant, on the 5th July, sent the Manufacturers' and Merchants' Bank's check and the three forged checks through the clearing house back upon the Manufacturers' and Merchants' Bank, although in violation of the clearing house rules; and the latter bank, acting in conformity with the rule, paid them and received the checks, and charged the plaintiff with the amount so paid, and sent the four checks to the plaintiff. On the succeeding day, July 6th,

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the plaintiff presented the four checks at the defendant's bank and tendered them to its cashier and officers, and demanded payment of their amount; but the defendant refused to receive the checks or to pay.

On the 27th July the plaintiff sent the forged checks through the Manufacturers' and Merchants' Bank, but in the usual sealed package to the clearing house, as liabilities of the defendant, which paid them, but at once returned them to the Manufacturers' and Merchants' Bank through the clearing house, and gave notice to that bank that, upon any further return to defendant of the checks through the clearing house, exchanges between the defendant and Manufacturers' and Merchants' Bank would be broken off. The Manufacturers' and Merchants' Bank paid the checks when returned from the clearing house, and took them into its possession; again charging the plaintiff with them and returning them to the plaintiff. The plaintiff then obtained an assignment of its claim against the defendant from the Manufacturers' and Merchants' Bank, and, after demanding the money from the defendant, commenced this suit thereon.

Upon the trial the judge dismissed the plaintiff's complaint after hearing its own testimony.

*S. K. Wrightman*, for the plaintiff.

*Jno. S. Burrill*, for the defendant.

Present—INGRAHAM, P. J., LEONARD and GILBERT, JJ.

By the Court—GILBERT, J. We are unable to discover any ground upon which we could properly reverse the judgment below. Treating the Merchants' and Manufacturers' Bank as the principal in the transaction, there was no valid objection to the defendants demanding and receiving the amounts of the forged checks. The only objection stated is, that the defendants being the drawers of the forged checks, are presumed to know the signature of the drawer; and

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that having received the checks through the clearing house and charged them to the account of their customers, whose names had been forged, they were precluded from making such demand. The answer to this is, that it is at least doubtful whether the facts make out a payment of the forged checks, within the meaning of the rule referred to, or whether that rule can properly be applied to a case like this. The only facts making out a payment to the Merchants' and Manufacturers' Bank occurred at the clearing house, and consisted in charging the defendants and crediting the Merchants' and Manufacturers' Bank with the checks. And this was done under a rule assented to by both parties, giving the right to the defendants to return the checks to the Merchants' and Manufacturers Bank on the same day they received them from the clearing house, and requiring that on being so returned, the Merchants' and Manufacturers' Bank should refund the amount thereof to the defendants. The only departure from the rule thus established was, that the checks were not returned on the same day. The question, therefore, was one fairly open to dispute. But, if not, surely it was competent for the Merchants' and Manufacturers' Bank to waive the delay in returning the checks. And even if such waiver was induced by the defendants' threatened refusal to make further exchanges with them, it is none the less effectual; for the defendants might, without assigning any reason, break off such exchanges. There was nothing coercive or compulsory, therefore, in their insisting upon the amount of the forged checks being refunded as a condition of continuing such exchanges. The subsequent conduct of the Merchants' and Manufacturers' Bank is proof that they did not act under compulsion, and in legal effect is a complete affirmation of the transaction.

We see no reason why the Merchants' and Manufacturers' Bank should be treated otherwise than as principals. They received the checks deposited with them by the plaintiff, and passed them to the credit of the latter. The account seems to have been kept in the usual mode in which accounts are



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kept between a bank and its customers. The general rule certainly is that money or checks paid into a bank cease to belong to the person paying them in, and become the property of the bank. (*Foley v. Hill*, 2 H. L. Cas., 36.)

We perceive nothing in the nature of the dealings between the plaintiff and the Merchants' and Manufacturers' Bank to take them out of this general rule. If these views are correct they had nothing to assign to the plaintiff. But even if, as is contended by the plaintiff, the Merchants' and Manufacturers' Bank acted as their agents merely, and they acted without actual authority in refunding the amount of the forged checks to the defendants, that fact would create no right of action against the defendants in favor of the plaintiff, but would, at most, render the Merchants' and Manufacturers' Bank liable to the plaintiff. As between the defendants and the Merchants' and Manufacturers Bank, the latter, from the nature of the dealings and under the rules of the clearing house, could be treated as principals only.

The plaintiff having assented that such should be the nature of the agency, thereby conferred upon the agent, as far as third persons are concerned, authority to do in the premises whatsoever they themselves might do. (Story Ag., 60, 106.)

For these reasons the judgment appealed from must be affirmed, with costs.

LEONARD, J. The Manufacturers' and Merchants' Bank voluntarily paid the check for \$4,309 to the defendants upon request, without any objections, and that sum was thereby removed from any further reasonable controversy. The defendants retained the first three checks for so long a time after the presentation and settlement at the clearing house that it became quite probable that the defendants could not maintain a claim to have the amount repaid, but that condition of the case was changed by the subsequent transactions. The mere passing of the checks through the clearing house from one bank to the other did not affect their respective rights, if immediate action had been taken to notify the bank

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from which the check had been received of the error or wrong committed. But the plaintiff retained the checks for many days after they had been returned by the defendants to the Manufacturers' and Merchants' Bank, and by the latter bank charged and returned to the plaintiff's bank. This must be regarded as a voluntary payment or as operating to that effect by acquiescence or ratification. Neither the Manufacturers' and Merchants' Bank nor the plaintiff's bank notified the defendants' bank after the return of the checks by the defendants' bank through the clearing house within the time allowed by the rules of the clearing house that they did not intend to be bound as upon a payment of that amount to the defendants, nor did they assert their rights, if they had any, in due season to entitle them to be relieved from the presumption that the transaction was to be regarded as voluntary. There is no fact in the case to support an argument that the payment was obtained by coercion. The exceptions of the plaintiff must be overruled and judgment ordered for the defendants. Judgment affirmed.

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ORLANDO A. WOOD, Appellant, v. AUGUSTA M. WOOD,  
Respondent.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

An order for alimony, *pendente lite*, is superseded by the judgment. If future alimony ought to be paid after judgment, a clause to that effect should be inserted in it. Or if reasons exist for its payment pending an appeal, a fresh application should be made. It seems the rule is the same in respect to all orders made upon interlocutory applications.

THIS was an appeal from an order at Special Term, directing the plaintiff to pay alimony.

Judgment in the action was rendered in the defendant's favor in November, 1871, and then entered. An appeal was taken by the plaintiff from the judgment in January, 1872, but withdrawn in the succeeding July.

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Wood v. Wood.

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There was an order made in the action for alimony to the defendant, *pendente lite*, and the plaintiff paid alimony until November 4, 1871, when the judgment was entered.

The defendant moved, after withdrawal of the appeal, to compel the plaintiff to pay alimony up to the time of the discontinuance, and obtained an order to that effect, from which the plaintiff appealed.

*E. Cooke*, for the appellant.

*L. K. Miller*, for the respondent.

Present—BARNARD, P. J., and GILBERT, J.

By the Court—GILBERT, J. We think the order appealed from was erroneous. The order for temporary alimony was superseded by the judgment. That is the rule in respect to all orders made upon interlocutory applications. Thus an injunction which has been granted upon an interlocutory application is superseded by the decree made at the hearing of the cause. (*Dan. Ch. Pr.*, 4th Am. ed., 1679.) The same rule has been applied to suits for divorce. (*Longfellow v. Longfellow*, Clark's Ch. R., 344; *Stanford v. Stanford*, 1 Edw., 317; *Moncrief v. Moncrief*, 15 Abb. Pr., 187; *Germond v. Germond*, 1 Paige, 83; 1 Phill. Ecc., 203; *Poynter, M. & D.*, 249, *et seq.*) The judgment concludes the parties on the subject of alimony, as well as other matters involved in the suit. If the husband ought to pay future alimony, a clause to that effect should be inserted in the judgment. If the judgment contain no such direction, and reasons exist for the continuance of temporary alimony pending an appeal from the judgment, a fresh application in some form should be made. It will be time enough to lay down a rule governing proceedings in such a case when the case arises. For the present it is sufficient to say that an interlocutory order for the payment of temporary alimony is not operative after judgment.

Order reversed, with costs.

## Hall v. Siegel.

EDWARD HALL, Respondent, v. FRANCIS SIEGEL and others,  
Appellants.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

A judgment against a corporation is evidence of its indebtedness in an action to enforce the corporate liability against a stockholder.

*Allen v. White* (57 Barb., 504) reaffirmed.

The trustees of a corporation for social and recreative purposes, under the act of 1865, chap. 368, are liable for its debts as therein provided (§ 7), upon condition that a suit to enforce *such* liability shall be brought within a year.

Accordingly *held*, that a judgment recovered against the corporation, within a year from the time when the debt (payable within a year from the time when it had been contracted) had become due and payable, was not evidence of a stockholder's liability in an action brought against him after the year had expired.

THIS was an appeal from a judgment for the plaintiff, entered upon the report of a referee.

The appellants and others on the 2d day of May, 1868, became incorporated, under chapter 368, Laws of 1865, and, in the certificate of incorporation, were named as trustees of the corporation, which was called "The Association of the United Sharpshooters of New York and Vicinity."

On the 16th day of October, 1871, the suit was commenced by the plaintiff, claiming as assignee of six several judgments, obtained against the corporation in December, 1868, and in January and February, 1869. The answer of the appellants, admitting the incorporation, put in issue all other allegations of the complaint, and claimed also as a separate defence that the action could not be maintained, because it was not commenced within one year after the alleged debts became due and payable.

The issues were tried before a referee. The defendants first moved to dismiss the complaint because it did not state facts sufficient to constitute a cause of action. When this motion was overruled the plaintiff offered in evidence the certificate of incorporation, a copy of the judgment record of the judgment recovered against the corporation, *by default*,

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and the execution issued thereon, with the sheriff's return of *nulla bona*, and the assignment of the judgments to the plaintiff, and then rested. The counsel for the defendants objected to the introduction of the judgment record and execution and return, as *res inter alios acta*, and, when the plaintiff rested, again moved to dismiss the complaint, specifying particularly the grounds of such motion. The referee overruled the motion. The counsel for the defendants took proper exceptions to each of the rulings of the referee, who reported in favor of the plaintiff; and from the judgments entered on his report this appeal has been taken.

*James Eschwege*, for the plaintiffs.

*Royal S. Crane*, for the respondent.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

By the Court—GILBERT, J. With respect to the effect of the judgment recovered against the corporation, we feel bound to adhere to the decision of this court in the case of *Miller v. White* (57 Barb., 504). That case was deliberately determined, and nothing has been presented on the argument of this case which was not then duly considered. That decision must stand, therefore, as the rule of law on this subject until reversed.

The case shows that this action was not brought until several years after the debt sought to be recovered became due and payable. It also shows that a suit was commenced against the corporation and prosecuted to judgment within a year after such debt became due and payable. The question is thus presented whether the defendants are liable. The seventh section of the statute on this subject (Laws 1865, chap. 368) provides that "the trustees of any company or corporation, organized under the provisions of this act, shall be jointly and severally liable for all debts due from said company or corporation, contracted while they are trustees,

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provided said debts are payable within one year from the time they shall have been contracted, and provided a suit for the collection of the same shall be brought within one year after the debt shall become due and payable."

The respondents contend that the commencement of a suit against the corporation within the year, to which the section quoted refers, was a sufficient compliance with the last condition therein contained. We are of opinion that, by a fair and reasonable construction of that section, the trustees are rendered liable for the debts of the corporation on condition that a suit, *to enforce such liability*, be brought within one year after the debt became due and payable. This section creates several qualifications of the liability which it imposes by general words on the trustees; and it is quite manifest that the sole object of each of them was their protection. They are made liable only for debts contracted while they are trustees. They are not made liable for all such debts, but only for such as are payable within one year; and then is superadded the further condition that a suit for the collection of the same shall be brought within one year after the same shall become due and payable. The object of this latter condition was to insure prompt action on the part of creditors, so that the trustees might be apprised of the claim made against them, and to afford them a timely opportunity for indemnifying themselves against their liability. The mere commencement of a suit against the corporation would not certainly secure these objects; for it might be commenced by service of process upon an officer of the corporation, and, in many cases, the fact might not come to the knowledge of the trustees, and the suit might be commenced after they had ceased to be trustees. In the latter case there would be no ground for a presumption of notice of the fact to them. If it had been the intention of the legislature to afford protection to the trustees by means of a notice that a suit had been brought against the corporation, we think the provision would have been couched in language more explicit and better adapted to accomplish the object.

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They would have required a notice in express terms, as they did in the general railroad act (Laws 1850, chap. 140, § 12), and in other cases. If they intended that the trustees should derive any other benefit from such a suit they would have required the creditor to exhaust his remedy, or, at least, proceed to judgment against the corporation.

Taking the letter of the statute, it may mean either that the suit shall be brought against the corporation or the trustees. The phrase, "a suit for the *collection of the same*," indicates nothing one way or the other. It is quite as applicable to a suit against the trustees as to one against the corporation, because the trustees are made liable primarily for the debts, and not, as in most similar cases, only after default of the corporation. Having a due regard, however, to the apparent object of the proviso, the connection in which it stands, and the fact that the subject-matter of the section relates exclusively to the liability of the trustees, we think the construction we have given to it is the better one. The statute is in the nature of a penal one; and this construction is in accordance with the maxim that the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted. (Dwarria, 736; Sedg. Cons. Laws, 324.) We therefore think it should govern this case.

This conclusion renders it unnecessary to consider the other questions presented.

The judgment must be reversed and a new trial granted at the circuit, with costs to abide the event.

Judgment reversed.

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Barney v. Burstenbinder.

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DANFORD N. BARNEY, as President of Wells, Fargo & Co.,  
Respondent, v. OTTO BURSTENBINDER, impleaded, &c.,  
Appellant.

(GENERAL TERM, FIRST DEPARTMENT, 1872.)

There is an implied duty on the part of shippers of dangerous goods to give notice of their nature to the carrier, or persons acting for him, in receiving them.

Omission to perform this duty is negligence, and renders the shipper liable for the consequences.

If an agent, in the course of his ordinary employment, ships such goods without notice of their nature, the principal is liable.

The defendant shipped nitro-glycerine to Los Angeles, Cal., by the plaintiff, a carrier, without notice of the nature of the shipment. The package leaked and was taken by the plaintiff to a warehouse at San Francisco for examination, and, while being opened, exploded, damaging the warehouse and freight stored there. *Held*, that the defendant was liable for the damages, although the opening of the package was the direct cause of the explosion.

*Held*, further, that although the damages were in part to real estate in California, an action for their recovery was in its nature personal and transitory, and might be brought wherever the defendant could be found and served.

THIS was an appeal from a judgment entered on a verdict and from an order refusing a new trial.

The action was brought by the plaintiff as president of Wells, Fargo & Co., a joint stock association, against the appellant and others, to recover damages for injury to the property of Wells, Fargo & Co. and of others, in their possession, caused by an explosion of a box of nitro-glycerine, delivered to the plaintiffs' company as common carriers, for transportation from New York to Los Angeles, Cal.

The defendant, Burstenbinder, answered, denying the allegation that he delivered the box to the plaintiff's company, or that he authorized its delivery to it, and he averred that the alleged explosion was occasioned solely by the negligence of the plaintiff's company.

The evidence given upon the trial by the plaintiff was con



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tradicted by the defendant's evidence in essential particulars, but it tended to establish the following facts, viz. : That the nitro-glycerine, contained in glass carboys and boxed, was shipped, by direction of one Deveau, upon the plaintiff's steamer, to one Mills, to whom it had been sold, from New York to Los Angeles, California. That no notice of the character of the contents of the box was given to the plaintiff. On the passage the box showed leakage, and it was taken into the warehouse of the plaintiff's company at San Francisco for examination by its employes, where it exploded while being opened, and destroyed property, belonging to the plaintiff's company and to others, of great value.

The plaintiff's evidence was also that the box, in question, one of three which had been consigned to Probst & Co. from Hamburgh, in bond, without paying duties, to be forwarded to Bandman & Co., San Francisco, was received by Probst & Co. at New York, without any information that it contained dangerous materials, and placed by that firm in the bonded warehouse at Hoboken. Probst & Co. were first informed of the character of the goods by the defendant, Burstenbinder, who called on them and communicated the information, after receiving, through Probst & Co., a closed letter from the Hamburgh shippers, in which Burstenbinder was asked to look up the boxes. Upon learning the nature of the article inclosed in the boxes, Probst & Co., at the suggestion of Burstenbinder, offered to sell the oil to a company known as the Blasting Oil Company, which refused to purchase.

Probst & Co. refused to ship the oil to California, and the fact being reported to the shippers at Hamburgh, they directed Burstenbinder, to sell it. Meanwhile, Burstenbinder had obtained consent of the Blasting Oil Company to store the oil in its magazine, and had stored it there while awaiting directions from the shippers. Deveau, who was also a defendant in the action and a member of the Blasting Oil Company, had authority from Burstenbinder to sell the oil, and the sale to Mills had been spoken of between them. Deveau, in the absence of Burstenbinder from New York, sold the oil to

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Mills, and shipped it to him at Los Angeles by the plaintiff's company, without notice of its character. Burstenbinder learned of the shipment on his return, and he received the payment made for it to Deveau by the agent of Mills.

*C. C. Egan*, for the appellant, contended that the venue was local in California, and the court had no jurisdiction; citing 1 Chitty Pl., 271, 284; 1 Bacon, 56; 1 Tidd., 369; 2 East, 497; 1 Sand. Pl. & E., 412; 1 Taunt., 379; 2 W. Black. R., 1070; *Doulson v. Matthews*, 4 Term R., 503; Cowp., 410; *Watts, admr., v. Kinney*, 23 Wend., 484; id., 6 Hill, 82; Code, § 123; 2 Edmonds' R. S., 426, § 2; *Livingston v. Jefferson*, 1 Brockenb. R., 203; Story on Conflict of Laws, §§ 466, 554.

On the question of agency, *Laugher v. Pointer*, 5 Barn. & Cress., 547; *Milligan v. Wedge*, 12 Adol. & Ellis, 737; Story Ag., §§ 452-3-6; *Sproul v. Hemmingway*, 14 Pick.,; Reeve Dom. Rel., 310; *Blake v. Ferris*, 1 Seld., 48; *Pack v. The Mayor, &c.*, 8 N. Y., 222.

As to the special and limited character of the agency of Deveau, *Gibson v. Colt*, 7 John. R., 390; *Beals v. Allen*, 18 John., 363; *Rossiter v. Rossiter*, 8 Wend., 494; 21 N. Y., 225; *Lightbody v. N. A. Ins. Co.*, 23 Wend., 18; *Munn v. Commission Co.*, 15 John., 44; *Smith v. Tracy*, 36 N. Y., 81; *Mali v. Lord*, 39 N. Y., 381; 1 Daly, 502; 4 Greenleaf, 464.

That the principal could be only held for lawful acts of his agent, *Clark v. Met. Bank*, 3 Duer, 241; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y., 479; *Weed v. Panama R. R. Co.*, 17 N. Y., 362; *Wright v. Wilcox*, 19 Wend., 343; *Jetter v. N. Y. & Harlem R. R. Co.*, 39 N. Y. [2 Keyes], 162; *Hauck v. Fearing*, 5 Robt., 528.

*G. W. Soren*, for the respondent, upon the question of liability for neglect to give notice, cited *Farrant v. Barnes*, 11 Com. B. (N. S.), 553; *Brass v. Maitland*, 6 El. & Bl., 489; *Thomas v. Winchester*, 2 Seld., 409. On the question of

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defendant's liability for the neglect of his agent, Smith, Master & S. (ed. 1870), pp. 228, 251; *Weed v. Panama R. R. Co.*, 17 N. Y., 362; *Jeffrey v. Bigelow*, 13 Wend., 518; *Fuller v. Wilson*, 3 Q. B., 67; *Rex v. Gutch, M. & M.*, 433; *Cooper v. Slade*, 6 H. Lords Cases, 746; *Rex v. Dixon*, 3 M. & S., 11; *Att'y-Gen'l v. Siddon*, 1 C. & J., 433; *Rex v. Almon*, 5 Burr., 2686; *Dyer*, 238; 12 Mod., 489.

Present—INGRAHAM, P. J., LEONARD and GILBERT, JJ.

By the Court, GILBERT, J. The verdict of the jury established the fact that Deveau was the agent of the defendant in shipping the nitro-glycerine in question, and that the same was shipped by Deveau in the due course of his business as such agent, without giving any notice to the plaintiff of the dangerous nature of the article shipped. The evidence was conflicting. The subject, however, was fairly submitted to the jury under proper instructions, and their verdict must be held conclusive. The question is whether there is an implied duty on the part of shippers of goods of this description to give notice of the dangerous nature of the goods to the shipowner or the person who receives the goods on his behalf.

We are of opinion that there is such a duty, and that the omission to perform it is an act of negligence which renders the shipper liable for the consequences.

The Courts of King's Bench and of Common Pleas, in England, have held in several instances that such a duty exists, and we think those decisions rest upon sound principle, and declare a salutary rule of law. (*Williams v. The E. I. Co.*, 3 East, 192; *Brass v. Maitland*, 6 E. & B., 470; *Farrant v. Barnes*, 11 C. B. [N. S.], 553; see, also, *Pierce v. Winsor*, 2 Sprague, 35; *Jeffrey v. Bigelow*, 13 Wend., 518.) A similar principle was affirmed by the Court of Appeals of this State in *Thomas v. Winchester* (2 Seld., 397).

The rule of law which makes a principal liable for all the negligent acts of his agent, done in the course of his ordinary employment, is too familiar and too well established to require to be supported by a citation of authorities. It was

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urged that the agent's omission to give notice of the nature of the goods in this case was a criminal, or, at least, an illegal act; and that, therefore, the defendant was not liable for it. No such distinction exists. (*Thomas v. Winchester, supra.*) The Court of Appeals held, in that case, that, "Although the defendant may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal."

We think no negligence can be imputed to the plaintiff in causing the package to be opened after its arrival at San Francisco. It is true, the opening of the package was the immediate cause of the disaster, for the consequences of which the defendant is sued. But it is quite reasonable to infer that if the defendant had performed his duty, and given notice of the dangerous character of the package, a different disposition of it would have been made, and the requisite care would have been taken to prevent an explosion. It was the duty of the plaintiff to take care of the package, and, if possible, to stop the leakage of its contents. He adopted the usual method of doing this. He had no reason to apprehend any danger, nor was he warned that it was necessary to use extraordinary care in handling the package. It was the fault of the defendant that such warning was not given. Although, therefore, it was the act of the plaintiff which caused the explosion, yet, for the reasons stated, such act was not a negligent one, which disentitles him to recover. (Add. Law of Torts, 20, 21.)

(There is nothing in the point that this action is local. The gravamen of it is the negligence of the defendant, whereby the plaintiff has sustained damages. Such an action in its nature is personal and transitory, and may be brought wherever the defendant can be found and served with process. The injury to real estate is only one element of the damages. Our statute applies only to causes of action arising within this State. (*Smith v. Bull*, 17 Wend., 323.)

We have looked into the other exceptions presented on

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belialf of the defendant, but find none of them tenable. Upon the whole case, therefore, our opinion is that the judgment should be affirmed, with costs.

Judgment affirmed.

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CITY OF OGDENBURGH, Appellant, v. CHARLES LYON,  
Respondent.

(GENERAL TERM, THIRD DEPARTMENT, JUNE, 1872.)

A city common council having authority to pass ordinances to preserve its harbors and water channels, and "to prevent and punish the casting and depositing therein, or the causing to be floated, drifted and deposited therein, of any substance which, in their judgment, may be liable to obstruct the same; to prevent and remove all obstructions therein and to punish the authors thereof," may pass an ordinance imposing penalties for depositing, &c., certain substances in a particular river, or the canals, raceways, &c., leading into it, which is, in fact, a harbor or water channel, without declaring therein that the river is such harbor or channel, and that the substances so deposited, &c., may get into or tend to obstruct the same.

Accordingly, a complaint for depositing, &c., prohibited substances in the river named in the ordinance, stating that the river is a harbor or water channel of the city, states a cause of action.

Assuming that the United States courts have exclusive jurisdiction of maritime torts, and that placing obstructions in navigable waters is such a tort, still the State legislature may confer upon municipalities, where navigable waters and harbors exist, police authority over the same, and the violation of a regulation adopted by the municipal authority, within the power conferred, is within the jurisdiction of the State courts.

*Held*, accordingly, that this court has jurisdiction of an action for the recovery of a penalty, prescribed by such an ordinance, for its violation, and that the act of the legislature under which the ordinance was passed was valid.

*Myers & Morris*, for the plaintiff.

*Footo & James*, for the defendant.

Present—POTTEE, DANIELS and PARKER, JJ.

PARKER, J. This is an appeal by the plaintiff from a judgment entered pursuant to an order of the St. Lawrence Spe-

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cial Term, sustaining defendant's demurrer to the complaint.

The action was brought to recover penalties for the violation of an ordinance of the common council of the city of Ogdensburgh, which ordinance, as set forth in the complaint, is as follows: "No person shall cast or deposit, or suffer or procure to be cast or deposited in the Oswegatchie river, or in any canal, raceway or pond leading into said river, in this city, any sawdust, shavings, chips, tanbark, earth or refuse matter from any saw-mill, machine shop, tannery or shop or manufactory of any kind, under the penalty of fifty dollars for each offence."

The violation of this ordinance is alleged as follows:

"And the plaintiff further shows, that the defendant afterwards, to wit, on or about the 30th day of June, 1871, *in said city*, did, contrary to and in violation of the ordinance aforesaid, cast and deposit, and did procure and cause to be cast and deposited, in the Oswegatchie river, *which forms one of the harbors in said city*, and in the raceway leading from defendant's mill or shop into said river, the same being one of the water channels of said city, certain sawdust, shavings, chips, bark and other refuse matter, from his mill or shop aforesaid, which had the effect to fill up and obstruct, and does fill up and obstruct, the water channels and harbors of said city, whereby," &c.

The defendant demurred to the complaint on the grounds:

1. That the said complaint does not state facts sufficient to constitute a cause of action.
2. That the court has no jurisdiction of the subject-matter of the action.

The court, at Special Term, sustained the demurrer upon the first ground, and gave judgment thereon for the defendant.

I am strongly inclined to think that the court erred, and that the demurrer was not well taken.

The decision of the Special Term was based upon the ground that the ordinance, for the violation of which the action was brought, was not authorized by the statute.

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The statute is as follows: "The common council shall have power to pass all such ordinances as they may deem proper to preserve the *harbors* and *water channels* of said city; to *prevent* and punish the casting and depositing therein, or the causing to be floated, drifted and deposited therein, of any substance which, in their judgment, may be liable to obstruct the same; to *prevent* and remove all obstructions therein, and to punish the authors thereof," &c.

The criticism of the defendant's counsel is, that the ordinance has no reference to the *harbors* and channels of the city, but is confined to the *Oswegatchie river* and the canals, raceways and ponds leading into it, without any reference to whether the substances prohibited from being thrown into them get into the harbors and channels, or have a tendency to obstruct the same. It is not necessary that the ordinance should follow the language of the statute. When the statute gives the common council of the city power to pass such ordinances as they may deem proper "to preserve the harbors and water channels of the city, to *prevent*," &c. (see language of the statute above quoted), and they pass an ordinance prohibiting the casting into the Oswegatchie river or into any raceway, &c., leading into the river, in the city, any sawdust, &c.; if the Oswegatchie river is, in fact, a harbor or water channel of the city, they have not, in passing such ordinance, exceeded their authority.

The complaint alleges that the Oswegatchie river forms one of the harbors in the city, and this stands admitted by the demurrer. The complaint also alleges that the defendant did, in said city, cast sawdust, &c., into the raceway leading into the said river, which had the effect to fill up and obstruct, and does fill up and obstruct, the water channels and harbors of said city. This is also admitted. The ordinance, therefore, as distinctly appears, goes no further than the statute allows.

It is not necessary that the raceway, into which the sawdust, &c., was cast by defendant, should be a navigable stream, or one of the water channels of the city, in order to authorize the plaintiff to prohibit the casting into it, in the city, of saw-

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dust, &c., provided the casting into it of such materials has a tendency to obstruct the harbor; and the complaint avers that it not merely has such tendency, but in fact produces such effect.

In a word, the statute authorizes the common council, by ordinance, to prevent the depositing, directly in the harbors of the city, any substance liable to obstruct them, or to do the same thing indirectly, by casting such substance, within the city, into any of the affluents of such harbors.

The ordinance clearly does not go beyond this, if the Oswegatchie river is, as alleged, and stands admitted in the case, one of those harbors. It is no defect in the ordinance that it fails to show that the Oswegatchie river is one of the harbors, or that sawdust, &c., cast into the raceways, &c., is drifted into the river. The validity of the ordinance depends upon the fact, and not the statement of it in the ordinance.

I am unable to see any such departure, in the ordinance, from the statute, as to affect its validity.

The court was clearly right in holding that there was no want of jurisdiction in this court to take cognizance of the action.

It can scarcely be pretended that an action upon the city ordinance would be cognizable in the admiralty courts, however it might be in regard to an action brought, independently of the ordinance, for the wrong of obstructing the harbors in the city. The subject of this action is the violation of the city ordinance, of which this court clearly has jurisdiction. The objection made goes rather to the validity of the statute authorizing the ordinance, as interfering with matters in the exclusive jurisdiction of the federal government, and thus may be urged in support of the *first* ground of demurrer.

It may be conceded, as the court below well says in the opinion delivered in this case, "that the United States courts have exclusive jurisdiction over maritime torts, and that placing obstructions in navigable waters would be such; still, the legislature of a State may confer upon municipalities, where navigable waters and harbors exist, police authority over the



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same; and a violation of any regulation the municipal authority should adopt, if within the power conferred, would be within the jurisdiction of the State courts."

The power conferred by the statute and exercised by the passage of the ordinance was one which the legislature could give. The city is not, because torts committed upon navigable water within its bounds, and contracts to be performed thereon, are within the exclusive jurisdiction of the admiralty courts, if they are so, precluded from the exercise of its governmental powers over such waters. They are still State, and not United States territory; and the State, or its municipalities under it, may pass all laws or ordinances for their government not in conflict with the Constitution of the United States or the laws of congress enacted within its constitutional powers. The federal government, under its power to regulate commerce between the States, may, no doubt, take into its hands the construction and improvement of harbors within the States. But this power does not prohibit the State from doing the same thing, for the purposes of its internal commerce. As was said by Chief Justice MARSHALL, in *Gibbons v. Ogden* (9 Wheaton, 1), "It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers: that, for example, of regulating commerce *within the State*." In case of conflict, no doubt the State law must yield to the law of congress. But until such conflict arises, the State law is valid and unimpeachable.

The court was right, therefore, in holding that it had jurisdiction of the subject of the action, and that the act of the legislature, under which the ordinance was passed, was valid. But, as before shown, it was error to hold that the demurrer was well taken, upon the ground that the ordinance upon which the suit is brought was unauthorized by the statute under which it was framed.

The judgment appealed from must, therefore, together

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with the order sustaining the demurrer, be reversed, with costs, and the demurrer overruled, with leave to the defendant to answer within twenty days after notice of the order to be entered herein, upon payment of plaintiff's costs.

POTTER and DANIELS, JJ., concurred.

Judgment reversed.

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7L	220
59nd	80

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THE PEOPLE ex rel. CHARLES SEYMOUR, Respondent, v. THE  
CANAL BOARD, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, JUNE, 1872.)

The direction of the statute (chapter 352 of 1849, § 4), that whenever the canal board shall, upon the hearing of any appeal from the award of the canal appraisers, reverse or modify such award, they shall state in the resolution or order relating to such appeal the grounds of such reversal or modification; and how much, if any, such award is increased or diminished is not merely directory but positive and peremptory, and a compliance with it is essential to the validity of any decision of the board in such case.

If the resolution or order is not in compliance with these provisions, it will be set aside upon *certiorari*.

And this will be done, notwithstanding the decision of the board is made, by the statute, final and conclusive.

The fact that, after the issuing of the writ, the board rescinded the resolution by which their decision was made, can have no effect upon the relator's right to a judicial construction of the act complained of.

Nor can the court, in a case where the decision is made by statute final and conclusive, look into the merits, or render judgment on the award. In such case, the power of the court is confined to the question whether the tribunal had jurisdiction to perform the act complained of, and in its performance has kept within the powers given it by law.

CERTIORARI to the canal board. The facts are stated in the opinion.

*L. Seymour*, for the relator.

*F. C. Barlow*, attorney-general, for the defendant.

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People ex rel. Seymour v. Canal Board.

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PARKER, J. This is a common-law certiorari to review the proceedings of the canal board in regard to an award of canal damages to the relator.

The relator claimed to be the owner of a farm in the town of Vestal, in the county of Broome, through which the Chenango canal extension is constructed. For the damage caused him thereby he filed a claim in the office of the canal appraisers, amounting, in the aggregate, to \$4,772.50. The appraisers made an award, giving the relator damages to the amount of \$4,046.43.

The canal commissioner in charge appealed to the canal board from the decision of the appraisers, and the hearing was had February 28, 1871; the canal board deciding the appeal by adopting the following resolution:

*"Resolved, That the award in this case be modified by reducing the same to the sum of \$3,019.92; and, as so modified, that the same be affirmed."*

No statement was made in this, or any other resolution or order, of the grounds of such modification, or how much the award of the appraisers was diminished, as required by section 4 of chapter 352 of the Laws of 1849.

That section is as follows: "Whenever the canal board shall, upon the hearing of any appeal from the award of the canal appraisers, reverse or modify such award, *they shall state*, in the resolution or order relating to said appeal, *the grounds* of such reversal or modification, and *how much*, if any, such award is *increased or diminished*."

This direction of the statute, as the Court of Appeals holds, in *The People v. Gardner* (24 N. Y. R., 583, 555), is not merely directory, but positive and peremptory; and a compliance with it essential to the validity of any decision of the board in such case.

The decision of the board, then, in the case at bar, was wholly invalid and void; and the relator had the right to have it set aside.

With this view he applied for and obtained the present writ, and although the determination sought to be set aside

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was void, yet a certiorari is a proper remedy, and allowable in such a case. "For this there would be no strict necessity, because the judgment [decision] might be regarded as a nullity, and impeached collaterally; still this court would perform what is the main office of a certiorari—the keeping of inferior magistrates within the compass of their power" (*The People v. The Judges of Suffolk*, 24 Wend., 253); and this will be done even in cases where the decision of the inferior tribunal is made by statute, as in this case, *final and conclusive*. (*Lawton v. Commissioners of Cambridge*, 2 Caines R., 179, 182; *Leroy v. Mayor, &c., of New York*, 20 John., 430.) In the former of these two cases the court say: "It is a position beyond contradiction that the King's Bench, in England (and this court is clothed with the same common-law authority), has jurisdiction and may award a *certiorari*, not only to inferior courts but to persons invested by the legislature with power to decide on the property rights of the citizen, even in cases where they are authorized by statute finally to hear and determine;" and, in the latter case, Judge WOODWORTH adopted the above language from the former case, and added: "This [supervisory] power will be exercised when the duty to be performed and the *manner of executing it* is clearly pointed out by law, and there shall appear to have been an essential departure from it."

The fact that, since the issuing of the writ, the canal board, recognizing the invalidity of the decision, has rescinded the resolution by which it was made, can have no effect upon the relator's rights in the premises. He has the same right to a judicial construction of the act complained of as before.

The result is that the determination of the canal board, modifying the award of the appraisers, must be reversed and wholly set aside as null and void.

This conclusion cannot be avoided, as defendant's counsel seeks to do, by showing that, under the evidence sent up by the appraisers upon the appeal to the canal board, the latter might well have held that the relator was entitled to no damages. Inasmuch as the decision is void, because the

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canal board, in their resolution deciding the case, stated no reasons, it cannot be cured and rendered valid by reasons supplied by this court, showing the conclusion right. Indeed, in such a case, where the decision of the inferior tribunal is made final and conclusive, this court is confined, I think, in the exercise of its supervising power, to the inquiry whether such tribunal had jurisdiction to perform the act complained of, and, in its performance, has kept within the powers given it by law. In cases of this kind, the office of a *certiorari* has not been enlarged by modern decisions.

In *The People v. The Board of Police* (39 N. Y. R., 506), in which the learned judge who gave the opinion of the court said, "I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits," there is no intimation that, in the class of cases to which this belongs, the office of the writ, as formerly held, was confined within too narrow limits; but, on the contrary, in regard to such cases, the former rule was recognized and adhered to. He specifies three classes of cases:

"1. A *certiorari*, at the common law, brought to review the *summary* conviction of a person charged with a crime or offence, where a *certiorari* and not a writ of error is the process by which a review is to be sought." The case then before the court was of that character.

"2. A common-law *certiorari* brought to review *other* proceedings of inferior tribunals, magistrates, boards of officers under a special or limited jurisdiction." Such is the case at bar.

"3. A *certiorari* prescribed or authorized by *statute* for the review of proceedings in certain cases."

"As to the last," he says, "it has been in later years held that errors, not jurisdictional, may, under the *provisions of the statutes*, be made the ground of reversal."

As to the second, the decisions in this State, thus far referred to, seem to hold, with much uniformity, that none but jurisdictional questions can be considered.

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And as to the first, it seems to have been conceded "that, in England, a conviction brought up by *certiorari* would be examined substantially as upon a bill of exceptions; and, in the case cited, no doubt is expressed that the writ here would raise the same questions."

The case then before the court was upon a *certiorari* to the board of police, to bring up for review the proceedings of that board, by which the relator, a member of the police force, had been fined upon a charge of neglect of duty, and the learned judge says: "I conclude, therefore, that, in the case before us [a case in his first class], the Supreme Court had power—and that, on this appeal, this court has power—to examine the case upon the whole evidence, to see whether, as a matter of law, there was any proof which could warrant a conviction of the relator of the charge of neglect of duty, &c."

This is no decision weakening the force of former decisions in regard to the office of a *certiorari* in cases like the present. Indeed, in the case at bar, there is the additional ground for restricting the operation of the writ to jurisdictional questions that the statute has intrusted the canal board with the power (when proceeding within the mode prescribed by the statute) to make a decision which shall be final and conclusive.

As we cannot, then, as the defendant asks us to do, look into the merits to sustain the decision, so neither can we, as the relator asks us to do, decide the questions brought up from the appraisers by the appeal to the canal board, and render judgment on the award.

The decision of the canal board, modifying the award of the appraisers, must, therefore, as already stated, be reversed and set aside as null and void, but without costs.

POTTER and DANIELS, JJ., concur.

Decision reversed.

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Prindle v. Beveridge

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EDWARD S. PRINDLE, Respondent, v. ALEXANDER BEVERIDGE,  
Appellant.

GEORGE S. LITTLE, Respondent, v. SAME, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, JUNE, 1872.)

A devise to testator's son J. for life, and, "if he leaves no legitimate heirs," then to testator's son D., is, *it seems*, by implication, a devise to the legitimate heirs of J., if any.

*Held*, also, that by "legitimate heirs" were meant *children* of J. or their descendants, and not the heirs general of J.

*Also*, the devise being in 1822, that an estate-tail, determinable on the indefinite failure of issue of J., was not intended, but the devise was to the children of J. or their descendants living at the death of J.

*Also*, that the devise over to D. was good as an executory devise.

An executor having in his hands funds sufficient to pay judgments rendered against testator in his lifetime and applicable to their payment, suffered testator's real estate to be sold under execution issued upon the judgments, and became the purchaser in his own name at the sale.

*Held*, that the purchase was fraudulent as against the devisee of the real estate and those claiming under him, and that the executor and his assigns held only as trustees for them.

*Held, also*, that a grantee of the devisee might set up this fraud as an equitable defence in an action brought to recover the real estate by one claiming under the executor, and avoid the title equally as if he was proceeding as plaintiff for that purpose.

Taking a quitclaim deed from one, claiming as tenant for life under a will, does not estop the grantee, or his assigns, from disputing the title of those claiming as remainder-men after the decease of the tenant for life. Nor does a reference to the will, by the deed, for a description of the premises.

In the case of fraud clearly established, a court of equity is not barred by lapse of time from granting relief where the cause of action arose before the Revised Statutes.

Statutes of limitation contained in the Revised Statutes, do not apply to causes of action or defences accruing before their passage.

APPEALS by the defendants from judgments entered for the plaintiffs on the reports of a referee. The facts are stated in the opinion.

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Prindle v. Beveridge.

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*M. Fairchild*, for the appellant.

*J. S. Coon*, for the respondent.

Present—POTTER, DANIELS and PARKER, JJ.

PARKER, J. These are actions of ejectment, depending upon the same questions.

Isaac Lytle made his will in 1822 and died in 1823. In his will is the following devise of the lands in dispute: "Fourthly. I allow my son Joseph to possess by devise of will the *farm* I now live on, it being No. 3, &c., with all the rights and privileges thereunto belonging, as freely and fully as if I had made him lawful conveyance by full covenant *during his natural life, but if he leaves no legitimate heirs*, then and in that case the property, according to my will, I allow to revert back to my son David, his heirs and assigns forever, without any hindrance from any person whatever, as fully and freely as if I had gave him a lawful conveyance."

Joseph Lytle, immediately upon the death of Isaac Lytle, went into possession of the farm, which consisted of 237 acres of land, and remained in possession until he died in January, 1829, never having had any child, and leaving a will, by which he devised the said real estate as follows: "I give and bequeath unto Cornelia, my beloved wife, the sole use and occupation of all my real estate in the town of Hebron, it being in lot No. 3, &c., which I am now in possession of by the last will and testament of Isaac Lytle, my father, for during her natural life, to her own proper use and benefit, during said time, and at her decease I will and do hereby give and bequeath unto Edward Sanford Prindle, my sister's son [plaintiff in first suit], fifty acres of land, to be laid off at right angles from the north end of the above described lots, and at her decease I do also will and do hereby give and bequeath unto George J. Lytle, my adopted son, a son of George M. Lytle, deceased [plaintiff in second suit], all the residue and remainder of the above described lot of land."

The said Cornelia Lytle died on the fifth day of March, 1859. She had, upon the death of her husband Joseph, suc-



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ceded him in the possession of the farm, and remained in possession until March, 1829, when she, in consideration of \$700, conveyed her interest by quit-claim deed to David Lytle, son of the said Isaac Lytle. David thereupon took possession and retained it until March, 1832, when he conveyed to John and Alexander Beveridge, and John subsequently, in April, 1854, conveyed his interest in the premises to Alexander, the defendant.

The plaintiffs claim by virtue of the devise to them respectively in the will of Joseph Lytle, insisting that he took a fee simple by the devise to him in the will of his father, Isaac Lytle.

Plaintiffs also claim that if Joseph did not acquire an estate in fee simple by the will of his father, he did so acquire it by virtue of a sheriff's sale of the farm, upon an execution against his father, made after the father's death, to him as the bidder, and a subsequent deed by the sheriff to him.

The defendant claims by virtue of the devise in the will of Isaac Lytle to David Lytle (his grantor), in the event that Joseph, the devisee for life, should die, "leaving no legitimate heirs," Joseph having died without ever having had any child, and denies that by his purchase at sheriff's sale Joseph acquired any interest in the premises.

The actions were referred and tried together before the referee, who decided and gave judgment in each case for the plaintiff, deciding that the will of Isaac Lytle gave an estate-tail to Joseph, which, by force of the statute of 1786, abolishing entails, vested in him the title to the lands in fee simple absolute, thus cutting off the remainder to David and his heirs.

The defendant has appealed from the judgment, disputing the correctness of that proposition, and that is the first question at issue in the case.

Both parties agree in construing the words "no legitimate heirs," in the will of Isaac Lytle, as not referring to heirs general, but as restricted to those descended from Joseph.

If the devise created what would have been, before the statute of 1782, an estate-tail, it is not denied that, by the op-

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ration of the subsequent statute of 1786 (Sess. 9, ch. 12), instead of an estate-tail, it became, in Joseph, an estate in fee simple absolute.

It is necessary, then, in the first place, to see what an estate-tail is, and what are the requisites necessary to constitute it.

By Cruise it is defined to be "an estate of *inheritance*, created by the statute *de donis conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general." (Cruise's Dig., title 2, chap. 1, § 12.)

Preston says: "The gift by which an estate-tail is to arise must, either in terms or in legal construction, be made to the *heirs of the body*. For it is more in respect to the particular heirs to which the limitation is confined, and the restriction by express words or by implication that the heirs *shall be of the body*, than of the time of the continuance under the gift, that the estate is denominated." (2 Pres. on Est., 358.)

"An estate-tail," says Chancellor KENT, in *Andrews v. Jackson* (16 John. R., 400), "necessarily implies *issue* in an indefinite succession."

In the case at bar, the devise is to Joseph for life, and, "if he leaves no legitimate heirs," then to David in fee.

It is to be observed that there is no express devise to the *legitimate heirs* of Joseph, should he leave any, and it is only by implication that such a devise is made, if made at all.

Two questions arise here:

1. Is the implication of a devise to the legitimate heirs of Joseph equivalent to a specific devise to that effect? and
2. If it had been specific in that form, would it imply a donation or grant to the issue of Joseph in an indefinite succession?

Upon the first of these questions it may be remarked, that there is no difference between the counsel for the respective parties; and the authorities seem to favor the position that, by implication, the farm was devised to the legitimate heirs of Joseph. (2 Jarman on Wills, 247.)

As to the second question, there is more difficulty. What

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is the force and effect of the implied devise to the *legitimate heirs* of Joseph, if he should leave any? Does it import a grant to the heirs of the body of Joseph, indefinitely extended? In other words, does the expression, "if he leaves no legitimate heirs," mean the same as "if he shall die without issue," and refer to an indefinite failure of issue, as the latter phrase is held, technically, to do?

If the implied devise to the *legitimate heirs* of Joseph in this case, is to issue *living at the death of Joseph*, the devise over to David is good as an executory devise; because, in that case, the time when the devise over is to take effect, if at all, by the failure of Joseph's issue, is fixed by Joseph's death. But if an indefinite failure of issue is meant by the words, "if he leaves no legitimate heirs," then the devise over is not good, the contingency being too remote, and Joseph took an estate-tail, which, by the statute, is converted into a fee simple absolute.

In determining whether an estate-tail was created in Joseph by the will, we are at liberty, and it is our duty, to see whether such was the *intent* of the testator; that is, whether, by the words he used, he intended to fix an eventual failure of issue, indeterminate as to time, as the period when the devise over should take effect.

Mr. Preston, in his treatise on estates (vol. 1, p. 275), speaking of the rule in *Shelly's Case*, says: "The rule is not so strict as to control the manifest intention, if that intention steers clear of the reason of the rule, or of its *literal terms*. The most strenuous advocates for a proper and legal application of the rule must admit that the *intention* is to be collected, and, if clearly expressed, observed. After the intention is fixed, the law decides on the gift; allowing the intention to govern, as often as it is clear that the word *heirs* is not used as descriptive of a *class of legal successors*, but in description of an individual, or *particular persons*; \* \* \* the true ground of decision is the *intent*; and the true question is, what is the intent; and the interpretation is to show the intent."

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This is equally true in respect to the construction of terms and phrases which have acquired the technical meaning of an *indefinite failure of issue*. Thus, it is said again by Preston, in respect to estates-tail: "The statute *de donis* requires the intention of the person who gives the estate to be observed, according to the words in which he has expressed his intention." (2 Pres. on Est., 377, 378.)

Let us look, then, at the words used by the testator in this case, and ascertain from them his intention. Did he mean by them to provide that the devise over to David should, for its effect, await the ultimate failure of Joseph's issue, after an indefinite succession in the particular line; or, rather, that it should take effect in case, at Joseph's death, he should leave no child or children surviving him?

I am strongly inclined to think that the latter construction of his words is the correct one.

It has already been observed that both parties agree in understanding the words, *no legitimate heirs*, as not referring to heirs general, but as restricted to those descended from Joseph. This is undoubtedly correct; for David, to whom the devise over is made, in case Joseph *leaves no legitimate heirs*, is one of his general heirs, and cannot be intended, in the words *legitimate heirs*, in the will, which gives the estate to *him* if Joseph leaves no such heirs.

Again, the word "legitimate," qualifying the word heirs, indicates that the testator did not use the word *heirs* in its technical meaning; for, when so used, the word legitimate is without force as a qualifying word. Heirs are, necessarily, legitimate. There can be no such thing as an illegitimate heir. Therefore we must construe the word *heirs* as having a meaning that the word legitimate will properly apply to.

In popular language, *heirs* and *children* are frequently synonymous. Children may be legitimate or illegitimate. Heirs cannot. The testator, then, did not mean *heirs*, by "legitimate heirs;" but must have meant legitimate children. We cannot say, either, that he meant *heirs of his body*, as plaintiff's counsel insist he did; for the word legitimate is

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no more applicable to that class of heirs than to heirs general. Both are necessarily legitimate, and the word is equally without force when applied to qualify either. It is said by Preston, "that the word *heirs*, in reference to limitations of legal estates, may be a word of *purchase*, even in a will; it must, in terms, be explained to be of the same import as *children*, and used to describe them, without extending to the whole line of successors." (1 Pres. on Est., 369; and see *Rogers v. Rogers*, 3 Wend., 521.) Since the words "legitimate heirs" have not acquired a fixed, legal construction, it is proper to give them such meaning as they naturally and reasonably import. It has often been admitted that even the words *dying without issue*, if construed independently of their fixed, legal effect, and according to their obvious and natural meaning, would import dying without leaving surviving children. (See *Anderson v. Jackson*, 16 John., 400; *Rogers v. Rogers*, 3 Wend., 508.)

It is safe, therefore, I think, to interpret the words *legitimate heirs* in this will as meaning *children*, and to conclude that the testator looked to the death of Joseph, without leaving children surviving him, as the event upon which the devise to David was to take effect.

This intent is further indicated by the use of the word *leaves*. "But if he *leaves* no legitimate heirs." The natural interpretation of these words unquestionably points to the time of Joseph's death. No other construction gives effect to the word *leaves*. The meaning to be derived from the words used, then, is, *if he dies leaving no legitimate children surviving him*.

As already observed, the technical term *heirs* is so qualified by the word *legitimate* as to lose its technical meaning. So that in the construction above given to that word there is no departure from the strict rule that "when a testator uses technical words he is presumed to employ them in their legal sense, *unless the context clearly indicates the contrary*."

In a note to the above rule, as stated by Mr. Jarman, Judge REDFIELD, in his work on Wills (1 Redf. on Wills, 429), says:

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"There are many late English cases which seem to adopt the more reasonable construction in regard to technical language used in a will, that it shall receive either a technical or popular construction, according to circumstances. \* \* \* In construing the autograph will of an illiterate man [which the will in question is], the *meaning of technical language may be disregarded*, but no word which has a clear and definite operation can be struck out. (*Hall v. Warren*, 9 H. L. Cas., 420; 7 Jur. [N. S.], 1089.) The foregoing decisions have occurred within the last few months in the court of last resort in England, and they seem to us to evince a determination not to allow technical rules of construction to overbear and break down all the better instincts, and involuntary sentiments of common sense, and the common experience of mankind, even in the construction of wills, and we hail the omen with no slight gratification." And it was said by SAVAGE, Ch. J., in *Patterson v. Ellis* (11 Wend., 292): "It is true that both in England and in this country courts have anxiously seized upon any expression or circumstance in the will which would limit the generality of the expression *dying without issue* or *for want of issue*, and confine it to issue living at the death of the first taker."

Although the spirit of many of the earlier English cases might seem to lead to the strict construction of the words, here in question, contended for by plaintiff's counsel, as referring to an indefinite failure of issue, still, in view of the different circumstances attending property and its transmission in this country as compared with those in England, of the plain and obvious *intent* of this illiterate testator, derived from the natural construction of his language, and of the greater freedom of the courts in the more recent decisions from the strict adherence to technical constructions, I am unable to avoid the conclusion that the natural construction of the words should prevail over the technical, and effect be given to the devise according to such natural construction, which, instead of creating an estate-tail in Joseph, gives him only a life estate, with remainder to his children surviving

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him in fee, and in default of such children then such remainder to David in fee.

I, therefore, think the referee was in error in holding that "the will of Isaac Lytle gave an estate-tail to Joseph Lytle," and, consequently, in error in giving judgment for the plaintiffs, so far as that ground of judgment is concerned.

This brings me to consider the other ground of recovery relied upon by the plaintiffs, which is the claim to the property through the sheriff's deed to Joseph.

Two judgments against Isaac Lytle were proved by the records thereof; one of the date of May 22d, 1815, for ninety-eight dollars and twenty-seven cents, the other of the date of May 19th, 1817, for \$225.10. The only evidence of the issuing of execution upon either judgment is the production of the register of the attorney in the last judgment, who was dead, stating a *fi. fa.* issued on the judgment December 5th, 1817. The sheriff's deed to Joseph, dated December 16, 1828, which was put in evidence, recites executions. I am inclined to think the evidence of the issuing of an execution upon one of the judgments was sufficient. (*Ieland v. Cameron*, 31 N. Y., 115.) But, admitting that to be so, the purchase by Joseph Lytle at the sheriff's sale was clearly inoperative to invest him with any title, except a trust. The referee has found "that said Joseph Lytle, at the time of the said sheriff's sale, had in his hands, power, or control, as an acting executor of the last will and testament of said Isaac Lytle, deceased, personal property, of the said Isaac, more than sufficient to pay and discharge the judgment and execution upon which said sale was made, and which was applicable to that purpose; and, also, that said purchase by said Joseph Lytle of said real estate at said sheriff's sale was fraudulent."

Here is not only the breach of duty in the trustee in purchasing property which he is bound to protect for the benefit of his *cestuis que trust* (for the executor is trustee for heirs and devisees, as well as distributees and legatees (*Fox v. Muckreth*, 1 Leading Cas. in Eq., 172, 211, 212, and notes),

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but in his purchase there is actual *fraud* against those entitled under the will. Instead of paying the judgment and execution with funds which he had in his hands, which it was his duty to apply to its payment, he fraudulently omitted to pay them in order to procure a sale of the farm that he might become the purchaser, and thereby defraud the devisees thereof; and that, too, by the payment of a sum so insignificant as greatly to enhance the grossness and wickedness of the fraud; for the sum bid and paid by him for this farm of 237 acres was only twenty-eight dollars and twenty-six cents, which, presumptively, is all that was due upon the judgments.

The circumstance that such a purchase is not absolutely void, but voidable only, is no obstacle in defendant's way against retaining the premises which he derived from David, the devisee thereof, in the will. He acquired all David's interest in the premises under the warranty deed of David to him and his brother, and his brother's release to him (1 R. S., 748, § 1, 1st ed.); and he may, under the Code, set up the equitable defence arising out of Joseph's fraudulent act, which, at most, made him but a trustee for David. And in setting it up as such defence, he is in position to avoid Joseph's title equally as if he were proceeding as plaintiff to do it.

David's taking a deed from Cornelia Lytle, to whom Joseph devised a life estate, does not bar him from denying Joseph's title, nor plaintiffs' under him. The deed is only a quitclaim, and does not estop him or his grantees from disputing the title of his grantor even, much less that of plaintiffs, who do not claim through the grantor. (*Sparrow v. Kingman*, 1 Coms., 242.) The taking of the deed from Cornelia is no such acknowledgment of Joseph's title, then, as to operate as an election, on David's part, to submit to the wrong; and, moreover, this is no case for an election.

Neither has there been any acquiescence on the part of David or defendant. The taking of the deed from Cornelia was void, as from it no admission of Joseph's title was implied. The fact that in the deed the will of Joseph is



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referred to does not operate as such admission. That reference is only made for description of the premises and not of the *estate* purchased. And since such deed, March 18, 1829, David and his grantee, the defendant, have been in the full possession and enjoyment of the premises. There has, therefore, been no acquiescence in Joseph's title.

But if there had been, as neither Joseph nor his devisees can claim, except through his manifest fraud, no lapse of time will be held sufficient to prevent a court of equity from giving relief. In the late case of *Bowen v. Evans* (House of Lords Cases, 257, 282) the lord chancellor (COTTENHAM) stated the principle as follows in regard to the setting aside of remote transactions on the ground of fraud: "Upon fraud clearly established, no lapse of time will protect the parties to it or those who claim under them against the jurisdiction of equity depriving them of the effects of their plunder." (*Fox v. Macketh*, 1 Lead. Cas. in Eq., 219, notes.)

It is not a case for the application of the statute of limitations against the defendant in sustaining his possession and the right thereto. Before the Revised Statutes the statute of limitations did not apply to courts of equity, although that court adopted it as a fit and convenient rule, not applying it, however, in cases of fraud or trust. (*Murray v. Carter*, 20 John., 583; *Decouche v. Savetier*, 3 John. Ch. R., 215.)

David, having obtained the possession before the adoption of the rule by the Revised Statutes, has, with his grantees, been in possession ever since. He and they are not within the reason of the rule. Moreover, it is decided that this statute does not apply to cases where the cause of action accrued before the Revised Statutes went into effect. (*Williams v. Field*, 2 Sandf. Ch. R., 534; *Calkins v. Calkins*, 3 Barb., 305; and see *Didier v. Davidson*, 2 Barb. Ch. R., 477, 484; *Van Allen v. Feltz*, 1 Keyes, 332; and *Lansing v. Blair*, 43 N. Y., 48.)

The defence, then, made to plaintiff's claim of the title obtained by Joseph under the sheriff's deed, is legitimate and effectual. It is, in effect merely that plaintiffs have the bare

## McCarty v. Terry.

legal title, coupled with no interest, while the defendant has the equitable title and the entire interest in the premises.

Under the Code there can be no doubt of the sufficiency of such a defence to an action, brought by the party having the legal title against one having the equitable title, to recover the premises.

Upon the whole case I am of the opinion that the plaintiffs were not shown to be entitled to recover, and that the judgments in their favor respectively are erroneous, and should be reversed and new trial granted, with costs to abide the event, and that the order of reference should be vacated.

POTTER and DANIELS, JJ., concur.

Judgment reversed.

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SARAH J. MCCARTY, Respondent, v. SETH H. TERRY et al.  
and ROBERT DINNING, Appellants.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

The only purposes to which a power of sale, to the executor, contained in a will could be applicable, being the payment of debts and legacies and to carry into effect a devise to him of the real estate in trust, the doctrine of equitable conversion of the real into personal is not applicable where the personal estate is sufficient for the payment of the debts, &c., and the devise has been declared invalid. The rule *cessante ratione legis cessat ipsa lex* applies in such case.

*It seems* there would be no equitable conversion in such case, even if the executor were directed to sell the real estate.

The act of November 26, 1827, authorizing certain resident aliens to take and hold real estate, conferred, *it seems*, upon their heirs the right to inherit, notwithstanding their own alienage.

But that rule does not apply to a case where the ancestor afterward became a naturalized citizen. After his naturalization he held his property, not under the act, but under the same law as every other citizen, and alien heirs could not, therefore, inherit from him, unless he had complied with the provisions of 1 R. S., 719, 720.

The place of birth cannot be proved by hearsay, *e. g.*, by declarations of parents, although, it seems, pedigree may be.

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McCarty v. Terry.

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APPEAL from a judgment entered upon a decision at Special Term.

The facts are fully stated in the opinion of PARKER, J.

*E. Cowen*, for plaintiff.

*James Gibson*, for defendants.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—PARKER, J. This action is brought to recover possession of a certain farm in the town of Argyle, in the county of Washington, of which Thomas Murray died seized.

Thomas Murray was a native of Ireland, and came to this country prior to 1825. In January, 1825, he purchased and took a conveyance of the farm in question, and continued to hold and occupy it, residing in the town of Argyle from that time until his death, which occurred November 16, 1869.

He left no widow or child surviving him. It was conceded that all his relatives are aliens, except the plaintiff, his sister, and Washington Murray, his nephew. The plaintiff was born in Ireland, but became a citizen by marriage with a native of the United States, by virtue of the law of congress, approved February 10, 1855. The question of Washington Murray's citizenship is disputed.

Thomas Murray was authorized to hold real estate by an act passed November 26, 1827, and was naturalized and became a citizen of the United States December 8, 1836.

The defendant, Dinning, is in possession of the premises, claiming under a deed from Washington Murray. The defendants, Terry, Clapp and Hitchcock, claim some interest in the premises, as trustees, under the will of Thomas Murray. This will, after bequeathing certain legacies, gave the residue of the testator's property to said Terry, Clapp and Hitchcock, upon certain trusts which have been adjudged void by this court; and as to such residuary property, which

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includes the farm in question, the said Thomas Murray died intestate.

The will also contains the following clause: "Lastly, I do hereby appoint Seth H. Terry, &c., executors of this my last will and testament, with full power to sell all my estate, and convey the same." The personal property is sufficient to pay all debts and legacies, and no sale has been made of any of the real estate under the power in the will.

The cause was tried before a justice of this court without a jury, and a decision made and judgment given in favor of the plaintiff for the recovery of the premises claimed.

The appellants claim that, by virtue of the power of sale to the executors, there is an equitable conversion of the real estate to personal, which is to be distributed to the next of kin of Thomas Murray, both aliens and citizens. I think the court below held correctly in deciding that there was no equitable conversion of the farm into personal property.

There was personal property sufficient to pay the debts and legacies. The residuary devise, for which alone the sale authorized was necessary, has been declared void; and even if the executors had been *directed* to sell and distribute the proceeds to the charitable uses indicated in the clauses of the will pronounced invalid, as the object of the power has failed, the effect of such direction upon the character of the fund must also fail. The heir is not divested by the void devise, and the reason for the conversion does not arise, and the maxim, *cessante ratione legis, cessat ipsa lex*, applies. (*Jackson v. Janzen*, 6 John., 73; *Sharpsteen v. Tillou*, 3 Cow., 651; *Hawley v. James*, 7 Paige R., 213; *Wood v. Keyes*, 8 id., 365; *Bogert v. Hertell*, 4 Hill, 492; *Wright v. Trustees, &c.*, 1 Hoffm., 202; *White v. Howard*, 46 N. Y., 144.)

There is, then, in the power given to the executors to sell, no obstacle in the way of the plaintiff's recovery.

In regard to the citizenship of Washington Murray, I am also inclined to think the court below was right in holding him, under the proof, an alien. There is no evidence of his ever having resided in Argyle, where it is alleged he was

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born, nor in any part of the United States. He has no recollection of ever having done so. The declarations of his parents to him, or to others, that he was born in Argyle is but hearsay, and not, within the rule, admissible. "Although a pedigree may be proved by hearsay, the *place of birth* cannot." (*Jackson v. Elz*, 5 Cow., 320; *Rex v. Inhabitants of Erith*, 8 East, 539; 1 Phil. Ev., with C. & H.'s notes, Edwards' ed., 252, 253; *Mima Queen v. Hepburn*, 7 Cranch, 291; *Braintree v. Hingham*, 1 Pick., 245; *Wilmington v. Burlington*, 4 Pick., 174.)

It is insisted by the defendant's counsel that, under the act of 1827, authorizing Thomas Murray to hold real estate, his alien heirs can take equally with the plaintiff, who is a citizen. "This act," say the counsel, "enabled the testator not only to hold the lands but to transmit them, by descent, to his alien heirs; and this right is not affected by his subsequent naturalization."

The portion of the act bearing upon this question is as follows: "And that the title to any lands, tenements or hereditaments, heretofore purchased or acquired by any of the above named persons, shall not be impeached or defeated by reason of his, her or their alienage; but the same is hereby vested in each and every of the said persons, his, her or their heirs or assigns, in like manner as if he, she or they had been citizens of this State. \* \* \* And provided, also, that, in case either of the persons named in this act shall, after the expiration of six years from the passing of this act, be alive, and not naturalized according to the laws of the United States, or shall not then be a resident, all the lands which such persons may then hold by virtue of this act shall be vested in the people of this State, in the same manner as if this act had not been passed."

I am inclined to think that, while Thomas Murray was holding under the authority given him by this act, his estate would, upon his death, have descended to his alien heirs equally with those who were citizens. (*Goodell v. Jackson*, 20 John. R., 707-709; *Jackson v. Adams*, 7 Wend., 367

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*Duke of Cumberland v. Graves*, 3 Seld., 305.) And whether the court was right in holding that the defendant's case is not aided by the statute, because Thomas Murray failed to become naturalized within the six years specified in the act, notwithstanding his continued residence, it is not necessary to determine; for, after he did become naturalized, as the court correctly held, he no longer held under the act, but under the law by which every citizen held; and the alien heirs of a citizen cannot, except upon compliance with certain statutory conditions, inherit his lands lying in this State. (1 R. S., 719, § 8, and 720, § 17, 1st ed.; *Larreau v. Davignon*, 5 Abb. [N. S.], 367; *Duke of Cumberland v. Graves*, 3 Seld., 311.)

As to the defendants Terry and others, trustees, the decision made by this court in *Terry v. McCarty*, holding the devise under which they claim invalid, is an answer to their claim of an interest in the premises.

The judgment, that the plaintiff is entitled to recover the premises, is right and should be affirmed, with costs.

MILLER, P. J., and POTTER, J., concur.

Judgment affirmed.

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THE PRESIDENT OF THE UNION BRIDGE COMPANY, Appellant,  
v. THE TROY AND LANSINGBURGH RAILROAD COMPANY,  
Respondent.

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

If a committee of three directors has discretionary power for the execution and delivery of a lease of the corporate property, two of the members may seal it with the corporate seal, where the third is absent, but has approved its terms and concurred with the others in directing its engrossment for execution. *So held*, one of the members executing being president of the corporation and custodian of its seal.

And the signature of the two members and sealing by them is sufficient execution.

And, it seems, the corporate seal being properly affixed, no signature was necessary to the valid execution of the corporate lease.

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Where the resolution appointing the committee provided for a lease for a certain term of years, and the lease, as executed, was for an indefinite time, *held*, that the company afterward ratified the lease, as executed, by suffering the lessee to act upon it to its damage, by the receipt of rent and other acts recognizing its existence.

A contract made by a corporation in violation of the terms of its charter is *ultra vires*, and void as against public policy.

Corporations may invoke the aid of the court to relieve them from their illegal contracts in like manner as individuals.

In general, where parties contracting illegally are *in pari delicto*, courts of equity will not interfere to grant relief to either. But where the agreement is against public policy, the fact that the relief is asked by a party who is *particeps criminis* is not, in equity, material, because the public interest requires that relief should be given, and it is given, to the public through the party.

Accordingly *held*, that a contract, *e. g.*, a lease made by a railroad company for the purpose of extending its road beyond the *terminus* fixed by its charter, was *ultra vires*, and void as against public policy, and should be set aside by the courts on the application of one of the parties.

But, *held*, the court would not relieve the parties further than the public interest required, and, therefore, that no recovery could be permitted for the use of the property leased, previous to its being declared invalid.

*L. Tremain*, for the plaintiff.

*E. Cowen*, for the defendant.

Present—MILLER, POTTER and PARKER, JJ.

PARKER, J. This action was brought to obtain a judgment, declaring a certain writing purporting to be an agreement, or lease between the parties, void, and perpetually enjoining the defendants from crossing the bridge of the plaintiffs on the rails laid by defendants, and to recover the amount which plaintiffs allege defendants have become liable to pay on account of the crossing of said bridge for some time prior to the commencement of the suit.

The action was tried at the Saratoga circuit before a justice of this court and a jury. The jury was discharged, with the consent of the parties, at the close of the evidence, and the case reserved for the consideration of the justice, who

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subsequently rendered his decision dismissing the complaint upon the merits, with costs to defendants. From the judgment entered upon the dismissal of the complaint the plaintiffs appeal.

It appears from the findings of the justice that the plaintiffs are a bridge company duly incorporated under the laws of this State, and as such owned and maintained a toll bridge over the Hudson river between the village of Waterford, in the county of Saratoga, and the village of Lansingburgh, in the county of Rensselaer; that the defendants are a railroad corporation, duly organized for the purpose of constructing and operating a railroad, as declared in its articles of association, "from some point in the village of Lansingburgh to some point in the city of Troy, hereafter to be fixed and located," and its articles further declare "that the said road will be constructed entirely within the county of Rensselaer;" that on the thirty-first day of May, 1862, the plaintiffs' directors, at a meeting of their body duly called, adopted a resolution appointing Isaac McConihe, Charles S. Douglass and William B. Douglass a committee with power to enter into and complete and execute a contract with defendants, if they should think it for the interests of the plaintiffs, granting to the defendants the privilege of crossing the bridge of the plaintiffs with horse power for a term of years, to be agreed upon by the defendants and said committee, and for such compensation and on such conditions as such parties might agree upon; that all the members of the committee named in said resolution met a committee of three persons duly appointed and empowered on the part of the defendants, and said committee at said meeting deliberated and negotiated upon the subject-matter of such resolution; that at the time of such deliberation and negotiation, and upon consultation with all the members of each committee, and with the approval of Charles S. Douglass and William B. Douglass, his associates upon the committee so appointed by the plaintiffs, the said McConihe reduced to writing the terms of a contract between the parties then agreed upon, which writing was



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submitted to and approved by each and all of the members of said committees; that in consequence of interlineations in said writing it was agreed between said committees that he (the said McConihe) should make duplicate copies thereof, which should be executed by said committees; that within a short time thereafter the said McConihe did prepare duplicate copies of said writing in the same form in which it had been so adopted by said committees, which were executed and delivered by the said committee on behalf of the defendants under their hands and the corporate seal of the defendants, and the same were executed and delivered by the said Isaac McConihe and Charles S. Douglass under their hands and the corporate seal of the plaintiffs, but the same were never signed by the said William B. Douglass for the reason that he was the resident of a foreign county and was obliged to return to his residence before said copies were prepared; that afterward, in the year 1862, the defendants constructed their track across the bridge of the plaintiffs, under and in pursuance of said written agreement; that before said work was done the plaintiffs furnished to their superintendent a copy of said written agreement and instructed him to superintend the work for the purpose of seeing that the same was performed in obedience to the requirements of said written agreement, and said superintendent complied with such instructions; that from the date of said written agreement, and according to its terms, the defendants paid to the plaintiffs the rent or toll reserved thereby up to July, 1868, and the plaintiffs received the same, under and by virtue of said written agreement, with knowledge, by their directors, of the manner in which said contracts were executed, and the defendants performed the same on their part; also, that on the 1st day of June, 1864, the plaintiffs, at a meeting of the board of directors, adopted and entered on their book of minutes a preamble and resolution, reciting that by the contract between these parties the defendants were restricted to the passage of their cars across the plaintiff's bridge upon a walk of the horses, and com-

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plaining that defendants had permitted their cars to be driven across faster than a walk, to the injury of the bridge, and directing their president to seek the enforcing of the terms of the contract in that respect; that the contract, so referred to, was the same contract so executed as aforesaid; that the defendants, in reliance on said agreement, have expended large sums of money in constructing their track across said bridge, and in furnishing additional horses and equipments for its operation; that until about June, 1868, plaintiffs did not, in any mode, dissent from said agreement, or intimate that it was invalid for imperfect execution, or for any other cause; and defendants acted under the same in good faith; that in June, 1868, plaintiffs repudiated said agreement upon the ground that it was not, on their part, properly executed, and served upon defendants a notice to quit, and from that time have refused to receive the rent or toll reserved by said agreement.

As matter of law the justice concluded that the plaintiffs are not entitled to the relief demanded in the complaint, or any part thereof, and that the defendants are entitled to a judgment dismissing the complaint on the merits, with costs.

The plaintiffs insist, in the first place, that the agreement is void for the reason that it was signed by but two out of the three members of the committee on the part of the bridge company.

As the agreement was executed by two of the three committeemen by signing their names and impressing upon it the corporate seal, it being found that the third member of the committee concurred in the agreement as it was written, and in the undertaking that the duplicate copies to be made should be executed, I think it may well be held that the execution thus made was sufficient to bind the company.

Under such circumstances it cannot be said that the corporate seal was not properly affixed to the instrument. And if it was properly so affixed it was a sufficient execution, without the signature of either member of the committee. (3 John., 226; 3 Bos. & Pul., 306; 15 Wend., 258.)

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"The seal of a corporation aggregate, affixed to a deed, is of itself *prima facie* evidence that it was affixed by the authority of the corporation, especially if proved to have been put to the deed by an officer who was intrusted by the corporation with the custody of such seal." (*Lovett v. Steam Saw-mill Ass'n*, 6 Paige, 54, 56.) In that case the seal was affixed by the president of the company, and COWEN, vice-chancellor, said in the same case, p. 56: "Proof that the common seal was affixed, by no matter whom, is enough, *a fortiori*, when it is affixed by the head officer of the corporation."

In the case at bar, it sufficiently appears that the seal was affixed by the two members of the committee who signed the agreement, of whom one, McConihe, was president of the company, and had the custody of the seal. Although W. B. Douglass did not remain to sign the duplicate copies which he concurred in ordering to be made for execution, he concurred in the contract, and consented to the affixing of the seal. The committee performed the duty with which they were charged, when they completed the contract and directed the execution of the duplicates to be copied from the original drafts, in which they had concurred. It was not necessary to its execution that they should each sign it. It is said in *Angel & Ames on Corp.*, § 221: "But though by charter a certain number of a board are required to concur in entering into a special contract, or making a deed, it does not follow that the affixing of the seal, which is merely a ministerial act, may not be done by a less number than were at first competent to enter into the contract, provided it were done by the direction of a legal quorum."

This view precludes the necessity of examining the question of ratification, except so far as it affects the allegation that the committee exceeded the powers conferred upon them by the resolution, in not limiting the time of the right given to defendants to cross the bridge, to a term of years. As to this ground for declaring the contract void, it is a sufficient answer to say that the board of directors subsequently ratified the agreement made, so far as this objection is concerned, by

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suffering defendants to lay down their track across the bridge under the contract, taking the yearly compensation for six years, and by formally resolving to compel defendants to conform to the contract in the matter of driving across upon a walk. It is too late, after all this, for them to say that their committee exceeded their powers in conferring upon defendants the right to cross during the continuance of plaintiffs' charter. There can be no pretence that the board was, when all these acts were done, unacquainted with the terms of the agreement. They had it in their possession, and acted in reference to it and its specific provisions.

But again: it is urged by the plaintiffs that the contract is, particularly as to the defendants, *ultra vires*, in that it provides for the extending of their railroad beyond the limits specified in their articles of association, and hence, necessarily, *unlawful* and void.

The Troy and Lansingburgh Railroad Company was, by the terms of its articles of association, organized "for the purpose of constructing, maintaining and operating a railroad for public use, in the conveyance of passengers and property from some point in the village of Lansingburgh to some point in the city of Troy, to be located." And it is thereby further specified, that "the said road will be constructed entirely within the county of Rensselaer."

It is plain that the agreement in question was made for the purpose of enabling defendants to extend and operate their railroad, for public use, beyond the *terminus* which they had fixed, or were authorized, under their charter, to fix, in the village of Lansingburgh, and in the county of Rensselaer, across the Hudson river, into the village of Waterford, in the county of Saratoga.

They had no right to build and operate their railroad, for such purpose, beyond the limits fixed by their charter; and the agreement, by virtue of which they did so, was very clearly *ultra vires*.

As was said by SELDEN, J., in *Bissell v. The M. Southern and N. Indiana R. R. Companies* (22 N. Y., 285), "The

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contracts of corporations which are not authorized by their charters are illegal, because they are made *in contravention of public policy*;" and, again, "The assumption of any unauthorized power by a corporation is a violation of public policy and public right, and, therefore, illegal." (Id., p. 289.) If the agreement is illegal, as being against public policy, both parties must be deemed to have been cognizant of that fact when it was entered into. Defendants' powers, in regard to the right to cross the river with their railroad, are set forth in their articles of association, filed in the office of the Secretary of State. These articles, constituting defendant's charter, must be deemed known to plaintiffs, equally as though such charter was given by statute.

The same rule applies to corporations in regard to the right to invoke the aid of the court to relieve from illegal contracts as to individuals. Says SELDEN, J., in the case last cited (p. 304): "If it be said that, in the case of illegal contracts between individuals, each party is a participator in the guilt, and, hence, the law will not interfere to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute; and every one who deals with them is presumed to know the extent of their powers."

The parties are, in respect to this illegal contract, clearly *in pari delictu*; and the well known maxim, in such cases, is *potior est conditio possidentis, et defendantis*.

Will the court, then, listen to either party seeking relief from the contract?

In general, when parties are concerned in illegal agreements, courts of equity, acting upon the above maxim, will not interfere to grant relief to either. But in cases where the agreements are against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not, in equity, material, because the public interest requires that relief should be given; and it is given to the public through the party. (1 Story's Eq. Jur., § 298.) In *St. John v. St. John* (11 Ves., p. 535) the court say: "The authorities

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go to this, that when the transaction is *against policy*, it is no objection that the plaintiff himself was a party in that transaction which is illegal. In *Sherly v. Ferries*, in the Court of Exchequer, a few years ago, the case of a marriage orocage bond, the plaintiff was a party to the transaction—*particeps criminis*; but the court held that when the relief is upon the policy of the law, that is not material, the public interest requires that the relief should be given; and it is given through that party.” (See, also, *Jackson v. Mitchell*, 13 Ves., 587.) And in note 4 to the case of *Hatch v. Hatch* (9 Ves., 299, Sumner’s ed.) it is stated as follows: “In delivering his judgment, in *Gilbert v. Chudleigh*, Lord HARDWICKE (as appears from Mr. Forrester’s MS.) expressed himself as follows: ‘It was urged for the defendant that this is a bill brought by one of the parties to a corrupt agreement against a representative of the other, who is a stranger to it; and that, though an exécuter might have claim to relief for the sake of providing assets, yet the court will show no favor to either of the parties themselves. But the truth is that, in these cases of violations of public policy, it is indifferent who stands before the court if the intention of the contract be evident; because the court does not regard the state and condition of the parties so much as the nature of the contract and the public good.’ The contract thus in question was a security, given as a consideration for procuring the obligor a public office.”

If the contract, in the case at bar, was illegal, as we have above held it to be, and if plaintiffs are not precluded from invoking the assistance of the court for relief, as the cases referred to seem to establish, then I think the plaintiffs were entitled to relief against the illegal contract, to the extent of having it decreed void, and the defendants perpetually enjoined from running their cars across plaintiffs’ bridge under or by virtue of it.

As to the demand in the complaint, that defendants be adjudged to pay plaintiffs for the use of the bridge, I do not see how that can well be granted. The court gives relief to

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the plaintiffs only so far as the public interest requires; it declares the contract void, and prohibits the defendants from further enforcing it, and thereby violating their public duty, but will not proceed further in behalf of the *particeps criminis*.

"Even in cases of a *premium pudicitiae*," says Judge STORY, "the distinction has been constantly maintained between bills for restraining the woman from enforcing the security given, and bills for compelling her to give up property already in her possession under the contract. At least, there is no case to be found where the contrary doctrine has been acted upon, except where creditors were concerned." (1 Story's Eq. Jur., § 299.) See, also, remark of Lord ELDEN, in *Rider v. Kidder* (10 Ves., § 66), to the same effect.

I think the court, at Special Term, was wrong in dismissing the complaint, and am of the opinion that a new trial should be granted, with costs to abide the event.

MILLER, P. J., concurs; POTTER, J., not voting.

BENJAMIN F. REXFORD, Appellant, v. JAMES B. MARQUIS,  
Respondent.

(GENERAL TERM, THIRD DEPARTMENT, MAY, 1872.)

A conveyance of land and a public-house thereon by metes and bounds, concluded thus, "it being the intention of the party of the first part to convey twenty-one feet and four inches of the north part of said public-house, together with the use of a lane or passway, twelve feet wide, from the green, and in rear of the said public-house, to the north line of the lot above deeded, to be kept open for the purpose of passing to and from the rear of said public-house to the public common." Held, the premises over which the way ran being included in the grant so qualified, that it was intended to except such premises, other than the use thereof as a way, from the deed.

Held, further, that the use of the way was not reserved, but excepted from the deed.

And that the exception was for the benefit of the grantor and his assigns. Conveyance of the use of a way, subject to the rights of a third party to pass over it, "to be kept open as a passway," held to intend that the

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passway should be kept open for the benefit of the grantor and his assigns.

Separate deeds to different grantees, from the same grantor, will not be construed together in determining rights of the grantees in relation to a common subject-matter.

The plaintiff's claim to a right of way being based on his user under a grant, and defendant's acquiescence and recognition of his right, *held*, that the user was evidence of the extent of the right, but not to prove its existence.

The grantee of a right of way to one piece of land cannot make use of it to pass into another and adjacent piece.

Thus, a right to use a way from a common to the boundary line of a particular lot will not authorize communication with an adjacent lot by means of the way.

Where an action is brought in equity and the demand is for purely equitable relief, the trial of questions of fact by the court is in its discretion.

*Held*, further, that the plaintiff was only entitled to a limited right of way, and such as was reasonably necessary and convenient for the purposes of the grant, and, accordingly, a judgment below, limiting it to eleven feet in height and allowing it to be covered, affirmed.

APPEALS by plaintiff and defendant from a judgment entered on the decision of a justice, at Special Term, in favor of the plaintiff.

The action was brought to compel the defendant to remove a building erected across an alleged passway, and to open the way for the benefit of the plaintiff. The case was tried before Mr. Justice BALCOM at Special Term, who found, in substance, the following facts:

That in February, 1842, one Thomas Milner, Sr., owned a piece of land in Norwich, Chenango county, fronting on Main street, a street running in a direction from north to south.

The piece or tract was in shape a parallelogram, having its frontage to the east and on Main street of the width of eighty-eight feet. On the south it was bounded by a public common, along which it ran westward to the depth of eighty-three feet, thence northward to property owned by the Chenango Bank (eighty-eight feet), and thence eastward to Main street (eighty-three feet).

On the 21st February, 1842, Milner, Sr., was occupying



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a public tavern on the premises, of a size, and situation thereon, as follows, viz. : The main building was in shape a parallelogram, with a frontage eastward on Main street and southward on the common, and having a width on Main street of sixty-five feet four inches. Its rear ran along a line parallel with Main street, at the distance of fifty feet and six inches therefrom, and extending sixty-five feet four inches to the north line or side of the building.

On this rear or west line of the building, forty-four feet from the common, or south boundary, an L, or wing at right angles, projected from the rear of the main building, of the width of the remainder thereof (twenty-one feet four inches), and extended back to the rear boundary of the lot; the depth of the L (thirty-two feet six inches) and portion of the main building, which it adjoined (fifty feet six inches), extending together the depth of the whole lot (eighty-three feet). The land to the west or rear of the west line of the tavern, except as occupied by the wing, was open up to the west line of the lot, or parallelogram.

On the 21st February, 1842, Milner, Sr., made a conveyance to one Kershaw of a portion of the tavern lot, viz., a lot having a front on Main street of twenty-one feet four inches (measuring southerly from the north-west corner of the tavern), and being of the same width throughout its depth (eighty-three feet) to the rear of the lot. This conveyance covered precisely the ground upon which the L of the tavern and the portion of the building to which the L was adjoined were situated, and it conveyed the premises, describing them by metes and bounds. Following the description, however, was this: "It being the intention of the party of the first part to convey twenty-one feet four inches of the north part of the said public-house, together with the use of a lane or passway, twelve feet wide, from the green, and in rear of the said public-house, to the north line of the lot above deeded, to be kept open for the purpose of passing to and from the rear of the said public-house to the public common."

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The portion of the original lot retained by Milner, Sr., north of the north line of the tavern and tavern wing (being a strip thirty feet eight inches in width and running eighty-three feet from Main street to the rear boundary of the lot), at the time of the conveyance to Kershaw was unoccupied by any building, but, sometime prior to 1845, a store adjacent to the tavern lot, covering twenty-two feet eight inches, or all but eight feet of the strip in width, and extending, in depth, from Main street, fifty feet and six inches to the west line of the main tavern building, was erected thereon.

Kershaw took possession under his deed, and in 1843 removed twelve feet, in depth, of the tavern L, from where it adjoined the rear of the main building, and opened and used the space on which so much of the L had stood, as a continuation of a way leading from the common, along the rear of the tavern. By this continuation of the way it was extended to the property on the north of the north tavern line.

February 21st, 1842, Milner, Sr., conveyed to one De Forest a lot twenty-one feet four inches in width on Main street, and described as bounded north by the lot of Kershaw, west by a line twelve feet westerly of the tavern building, and south by a line parallel with Kershaw's south line, with a clause as follows: "Also the use of twelve feet wide from the green to the twelve feet above deeded, reserving the right to James Kershaw and his assigns to pass and repass across the said twelve feet in rear of the house, which is to be kept open as a passway." De Forest took possession under his deed.

On the 7th March, 1842, Milner, Sr., conveyed to Milner, Jr., all of the original lot, eighty-eight feet north and south, and eighty-three feet east and west, except the two lots deeded to Kershaw and De Forest, and reserving those lots as conveyed. Milner, Jr., then took possession, under the deed, of the premises granted to him, and from the date of his conveyance until in the spring of 1845, continued to occupy them and to use and occupy the lane, or passway, twelve feet wide from the common, through the

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premises opened by Kershaw, and along the rear of the tavern, to his premises, on the north of the premises of Kershaw.

There were other conveyances, of the property contained in the original tract, which recognized, and undertook to provide for the passway.

Sometime in March, 1845, Milner, Jr., sold a lot to Rexford, the plaintiff, described as eight feet wide and extending from Main street eighty-three feet deep, bounded north by the north line of the eighty-eight by eighty-three feet plot; south by a line parallel thereto and eight feet distant therefrom; also "the privilege of using the lane running back of the store of the said party of the first part." The plaintiff entered into possession and used the land from the common to the lands covered by his deed from Milner, Jr., and continued in such use and occupation for more than twenty years, and until interference therewith by the defendant.

In 1845 the plaintiff erected upon the premises conveyed to him by Milner, Jr., and other premises adjoining on the north thereof, which he had purchased from the Chenango Bank, a two-story stone building, fifty feet in depth, and extending from Main street to the lane; and Milner, Jr., also built upon his remaining premises, adjoining the plaintiff's on the south, a like building.

On the 1st April, 1856, Kershaw, who had occupied the lot granted to him by Milner, Sr., from February 21, 1842, up to that time, conveyed to the defendant, with the same conditions, reservations, &c., as to the passway or lane, as were contained in the deed to him (Kershaw), and the defendant entered into possession. In the same year (1856) the defendant erected a building over the passway, not at first obstructing the way, but afterward he inclosed and obstructed it completely, but in such manner that it could be reopened; there was a promise made by the defendant to the plaintiff, when the former thus closed the way, to remove the obstruction whenever requested by the plaintiff to do so; and the defendant, in consideration of the plaintiff's permitting the obstruc-

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tion across the way to remain, shared with the plaintiff the expense of carrying fuel into the latter's premises; the last payment for such expense being made to the plaintiff in January, 1865.

In January, 1865, the plaintiff demanded the removal of the building which obstructed the way, and in December, 1868, a final refusal was made by the defendant to remove the building or open the way; the defendant then first claiming a right to occupy and obstruct the same.

The court also found as follows: That the plaintiff had held peaceable possession of the use of the lane for more than twenty years, and that the lane and way had been used and occupied by the plaintiff as a lane to the premises north of the defendant's land, adversely to the defendant and his grantor, for more than twenty years when the defendant obstructed the same.

And in the thirteenth finding of fact, that a lane eleven feet high through the defendant's building, upon the level of the lane south of defendant's premises, would be sufficiently large and light for plaintiff's use, and substantially as convenient for the purposes for which it was intended and had been used before obstructed.

Also that Jas. Kershaw, in receiving the deed from Milner, Sr., and Milner, Sr., in giving the deed, intended to reserve to Milner, Sr., and his assigns, the right to use the lane across the premises granted to Kershaw.

The court also rendered judgment for the plaintiff upon conclusions of law as follows, viz.:

"I. The plaintiff, by the deeds given in evidence, became and is entitled to the use of the lane in question as a lane or passway from the public green to his land along the rear of said public-house and twelve feet wide.

"II. The plaintiff has also a right to the use of such lane by prescription for the purpose of carrying fuel to his office, and for footmen to pass and repass.

"III. The defendant may lawfully cover such passageway with a building, if he leave a space so high and light that the

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way is substantially as convenient for the purposes for which it was reserved and has been used as before the erection of such building.

"IV. A passage twelve feet in width and eleven feet high will be sufficient for the purposes for which it was reserved and has been used.

"V. The defendant is not bound to open said passageway clear up through his building.

"VI. The defendant must open the passway, as above stated, twelve feet wide and eleven feet high, by the first day of January, 1871, provided the judgment herein shall have been entered and a certified copy thereof served fifteen days prior thereto, in accordance with the provisions of section 285 of the Code. If not so entered by December 15th, then fifteen days after service of notice of judgment."

The defendant's counsel made certain requests to find, which are as follows:

"I. That the plaintiff acquired no right of way, under the deeds given in evidence, to or in favor of the land which he purchased of Thomas Milner.

"II. That the plaintiff acquired no right of way, under the deeds given in evidence, to or in favor of the land which he purchased of the Bank of Chenango.

"III. That the plaintiff has not acquired a right of way to or in favor of the land which he purchased of Thomas Milner by user.

"IV. That the plaintiff has not acquired a right of way to or in favor of the land which he purchased of the Bank of Chenango by user.

"V. That the plaintiff has not enjoyed and possessed for twenty years the right of way adversely to this defendant and his grantor.

"VI. That a title or right to this way cannot be acquired by adverse possession.

"VII. That the plaintiff, by uniting the piece of land purchased of the Bank of Chenango with the land he purchased of Thomas Milner, Jr., lost all right of way which existed

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under the deeds put in evidence in favor of the land purchased of Milner.

"VIII. That the plaintiff, by the erection of his office partly upon the land purchased of Milner and partly upon the land purchased of the Bank of Chenango, so increased the burden of the way reserved in the deeds that the right was lost.

"IX. That the division of the land lying north of the defendant's into two estates, and the erection of the buildings so increased the burden of the easement reserved in the deeds, that the same was lost.

"X. That the plaintiff has no right to a way for any purpose, except for footmen to pass and repass and for drawing fuel to his office.

"XI. That defendant may place convenient and proper doors across said passway on his north and south lines, the plaintiff to be furnished with a key thereto, and said doors remain closed and locked, except when in use by the plaintiff."

And the justice, in addition to the findings contained in his decision, found and refused to find as follows. .

"I find as a question of fact and in addition to the findings contained in my said decision :

"I. That there has been no grant, exception or reservation of the right of way, except by the deed from Milner to Kershaw, and the deeds put in evidence and the contract testified to by the plaintiff, given to him by Milner for the sale of the eight feet of land subsequently conveyed by Milner to him by deed. And I also find that all user of the right of way has been since the date of the deed to Thomas Milner, Jr., in evidence.

"II. I do further specify and find that, upon the settlement of this case as aforesaid the defendant presented to and asked me to find and decide in his favor upon each and every of the eleven requests hereinbefore set forth, being the same requests submitted on his behalf upon the argument, and I declined and refused each and every of said requests severally."

The defendant's counsel duly excepted to the several

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refusals to find as requested, and also to some of the various findings; and to the latter as follows:

"1st. He excepts to every finding of fact limiting the passageway to eleven feet in height.

"2d. He excepts to every finding of fact denying to the plaintiff, or tending to deny to him, a passageway without cover.

"3d. The plaintiff excepts to the conclusion of the said judge allowing the defendant to build over the passageway in suit.

"4th. The plaintiff excepts to the finding of the said judge that a passway eleven feet high was a sufficient passway.

"5th The plaintiff excepts to each and every portion of the thirteenth finding of fact, and to each separate allegation of fact therein contained.

"6th. The plaintiff excepts to the decision of the said judge that the defendant may lawfully cover such passway with a building as contained in his third conclusion of law.

"7th. The plaintiff excepts to the finding in his fourth conclusion that a passageway eleven feet high will be sufficient for the purposes for which it was reserved and has been used.

"Lastly. The plaintiff excepts to the conclusion of the said judge that the defendant is not bound to open said passageway clear up through his building."

The defendant's counsel also, at the close of the plaintiff's testimony, moved for a nonsuit on various grounds, which motion was refused, and exception taken to the ruling. He also renewed his motion at the close of the evidence, which was denied, and an exception duly taken. A judgment was entered upon the decision of the justice, and the defendant appealed upon the ground that the plaintiff was not entitled to a right of way; and the plaintiff appealed upon the ground that he was entitled to an unlimited and open right of way.

*Isaac S. Newton*, for the plaintiff.

*David L. Follett*, for the defendant.

Present—MILLER, P. J., POTTER and PARKER, JJ.

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MILLER, P. J. The plaintiff's claim to the right of way in question in this action is sought to be maintained, first, by virtue of the deed from Thomas Milner to James Kershaw, the defendant's grantor; and, secondly, as a prescriptive right, acquired by the plaintiff by virtue of a conveyance to him by Thomas Milner, Jr, on the fifth day of November, 1845, and the subsequent use of the same, with the acquiescence of the defendant and his assent to the right claimed by the plaintiff.

*First.* As to the deed from Milner to Kershaw, it conveys a lot of land by boundaries, and then concludes as follows: "It being the intention of the parties of the first part to convey twenty-one feet and four inches of the north part of the said public-house, together with the use of a lane or passway, twelve feet wide, from the green, and in rear of the said public-house, to the north line of the lot above deeded, to be kept open for the purpose of passing to and from the rear of the said public-house to the public common."

By the language employed I think it is apparent that the parties intended only to convey the land, and to except the lane or passway from the effect of the conveyance. The concluding sentence, above cited, qualifies the description so as to exclude from it the lane or passway, except the use thereof in common with others. The deed conveyed the land to the grantee, subject to the use of the lane or passway, which it declared should be kept open. The grantee owned other lands at the north as well as south of the premises conveyed; and it was the manifest and clear intention of the parties that the lane or passway should be kept open and used as might be required for the benefit of the lands thus situated. If it was designed only for the use and advantage of the grantee, it was unnecessary to provide that it should be "kept open for the purpose of passing to and from the rear of the public-house to the public common;" as the grantee had such a right on his own land, independent of any such provision.

In *Watts v. Kinney* (6 Hill, 82) a lease of a mill, after an



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absolute demise, with a full use of the water, contained a further clause restricting the use of the water; and it was held that the lessee did not acquire an unqualified right of using all the water which the dam would contain; but that he must so use the dam as not to raise the water beyond what was provided for in the last condition of the lease. (See *S. U.*, 14 Wend., 41; and 23 id., 486.) This case is directly in point, and sustains the position that the provision in the deed relating to the passway qualifies and restricts its operation.

Nor was there any occasion for providing that the passway should extend to the "north line" of the lot deeded, if the provision was intended for the benefit merely of the grantee, as beyond the south line was on the land conveyed. The fact that "north" instead of "south" was used is strong and convincing evidence of the intention of the parties; and, in the absence of any evidence showing a mistake or misapprehension in this respect, it certainly is not to be presumed that any such existed. It would be doing violence to the plain import of the deed to assume that the parties intended directly contrary to its obvious meaning.

It is said that the clause in question, if a restriction, amounts to nothing because it is not in favor of any person or estate. I think it is not a restriction or reservation, but what is called, in law, an exception which must necessarily be in favor of the grantor who conveys and those who may claim under him. In *Ives v. Van Auken* (34 Barb., 567) the proper office of an exception in a deed, as distinguished from a reservation, is said to be to exempt from its operation "a part of that which is granted or comprised within its terms. It must be of such part as is severable from the rest." \* \* "The character of a reservation is always something issuing or coming out of the thing or property granted, and not a part of the thing itself; and, to be a good reservation, it must always be to the grantor or party executing it, and not to a stranger to the deed."

The right of way is included within the general bounda-

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ries and is severable from the rest, and, therefore, comes within the definition in the case cited. It does not issue or come out of the property granted but stands alone by itself, and, therefore, is not a reservation. It is not, in any way, similar to a reservation of the privilege in a well, which issues out of the land, but rests upon a different principle. (See *Ives v. Van Auker*, *supra*.) In *Craig v. Wells* (11 N. Y. [1 Ker.], 315), which is relied upon by the defendant's counsel, it was held that a clause in a deed excepting and prohibiting the right of using waters of a mill site for certain purposes did not create a condition, exception or reservation; that it could not be construed as a covenant, limiting the use of the property, and was a mere prohibition of the use of the thing granted, and, as such, was void. The decision is placed upon the ground, in part at least, that the prohibition is inconsistent with the title conveyed by the deed. The case is not analogous to the one at bar; and the point decided does not affect the question now considered.

It is a general principle, applicable to the construction of all instruments, that whatever may be fairly implied from the terms or language of an instrument is, in judgment of law, contained in it. (*Rogers v. Kneeland*, 10 Wend., 218; *Hull v. Samson*, 19 How., 489.)

Applying this rule, it is obvious, I think, upon the face of the conveyance, that it was intended that the passway or lane which the grantee was entitled to use was to be kept open for the benefit of the grantee and his assigns.

The deed from Thomas Milner to De Forest, which conveys the lot lying immediately south of the land conveyed to Kershaw, after a grant of the land described by boundaries, contains the following language: "Also the use of a lane, twelve feet wide, from the green to the twelve feet above deeded, reserving the right to James Kershaw and his assigns to pass and repass across the said twelve feet in rear of the house, which is to be kept open as a passway."

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This conveyance merely transfers the use of the land, subject to the right of Kershaw and his assigns to pass and repass, and declares that it shall be kept open as a passway; which means, I think, for the benefit of the grantor and his assigns, who are or may thereafter become interested.

It is claimed by the defendant's counsel that the two deeds should be construed together. The rule, no doubt, is that separate instruments, executed at the same time and relating to the same subject-matter, may be thus construed and taken as different parts of the same agreement. (*Hills v. Miller*, 3 Paige, 254; *Stow v. Tift*, 15 John., 458.) But to authorize this to be done, the instruments must be between the same parties. (*Craig v. Wells*, 11 N. Y., 315.) As these two deeds were separate and distinct, and between different parties, there is no reason why they should be considered together as a part of the same transaction. Whether read and construed together or separately, I think, makes no difference; as the reasonable construction of both is that it was intended to keep open the passway for the benefit of all parties who were or who might thereafter become interested. The use of the passway alone was intended to be conveyed; but it was to remain open for the benefit of the other land which the grantee owned, as well as for the grantees in the several deeds.

*Second.* As to the plaintiff's right to the way by prescription, it appears that the plaintiff acquired title by deed on the fifth of November, 1845, to a parcel of land, with the privilege of using the lane in the rear, which was opened in 1842 or 1843 by Kershaw himself, and was used by plaintiff Milner and Kershaw until the defendant built over it in 1858 or 1859. The defendant agreed to pay and did pay rent to the plaintiff for his interest, by reason of closing the passage, from 1860 to 1864 inclusive; thus admitting plaintiff's right. As some of the testimony shows, he afterward agreed to open it if required to do so; and first denied the plaintiff's right in December, 1868, or January, 1869. Here was an uninterrupted adverse user of over twenty years,

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which is held to confer a complete prescriptive title to a way or other easement, the extent of which is also to be exclusively governed by the user. (*Corning v. Gould*, 16 Wend., 534, 535; *Parker v. Foot*, 19 id., 309; *Miller v. Garlock*, 8 Barb., 153; *Townsend v. McDonald*, 12 N. Y., 381; *Flora v. Curbean*, 38 id., 111.) The plaintiff's claim, so far as this question is concerned, rests upon his deed, accompanied by acts asserting his right and the acquiescence of the defendant to the claim made. Under such a state of facts, it is not necessary to indulge in any presumption as to a grant, as it was actually in existence. The use of the way was evidence merely of its extent and character.

It is further insisted by the counsel for the defendant that even if there was a right of way in favor of the land lying north, yet, inasmuch as the plaintiff's office stands one-half upon other land besides that which he purchased of his grantor, the right of way does not extend to his office.

The doctrine is well settled that the owner of a right of way across one piece of land to another cannot use it to pass into an additional piece owned by him, and which lies adjacent to it. (*Howell v. King*, 1 Mod., 190, 191; *Colchester v. Roberts*, 4 M. & W., 769, 774; Wash. on Ease., 60, 185; *Shroeder v. Brenneman*, 23 Penn., 348; *French v. Marsten*, 24 N. H. [4 Hort.], 443.) Nor can the right of way be extended and enlarged, without the assent of the parties, beyond the purpose originally intended. (*Allan v. Gomme*, 11 Adol. & E., 759, 772, 774; 3 P. & D., 581; Wash. on Ease., 192.) The lot being in a village, it is a fair assumption, I think, that the right of way was intended to embrace any building which might be erected upon it. This construction was placed upon it by the acts and conduct of both the parties; for it had been used in that manner for upward of twenty years. While, then, the right of way was open to the plaintiff's lot, there was, I think, no authority to use it for the benefit of that portion of the lot which he purchased from another party.

In this respect the justice erred in refusing to find that the

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plaintiff acquired no right of way, under the deeds given in evidence, to and in favor of the land which he purchased of the Bank of Chenango, and in refusing to find that the plaintiff acquired no such right by user. As, however, the judgment can be modified so as to confine the plaintiff's right to the land which he purchased of Thomas Milner, Jr., the error of the judge in these particulars is not fatal. The plaintiff is entitled to have the lane opened for this purpose; and if he uses it or attempts to do so beyond what he is entitled to the defendant can seek the proper redress.

The objection urged, that the case was one for a jury and not the court, is not well taken. Although the question as to the extent of the way and the manner of its use was proper for the determination of a jury, as well, perhaps, as the question of adverse possession, yet, as this was an equity cause, and the relief demanded purely of an equitable character, I think that the defendant was not entitled, as a matter of right, to a trial by jury. It was, therefore, a matter of discretion; and the exercise of this is not reviewable. (Code, §§ 253, 254; *McCarty v. Edwards*, 24 How., 236; *Chesborough v. House*, 5 Duer, 125; *Wilson v. Forsyth*, 16 How., 448; *People v. A. & S. R. R. Co.*, 1 Lans., 319; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y., 46.)

The appeal by the plaintiff is not well taken, and I think the court was right in holding that the plaintiff was only entitled to a limited right of way, and such as was reasonably necessary and convenient for the purposes for which it was granted. (Wash. on Ease, 188; *Huson v. Young*, 4 Lans., 63; *Bakeman v. Talbot*, 31 N. Y., 366.)

There is no other objection urged which requires discussion. Neither party should have costs of this appeal.

The judgment of the court below should be modified in conformity with the suggestions made.

Ordered accordingly.

THE ARGUS COMPANY, Appellant, v. THE MAYOR, &c., OF  
THE CITY OF ALBANY, Respondent.

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1873.)

A city council having designated the plaintiff's newspaper as "the official paper, in accordance with the former resolution of the common council establishing an official organ," the resolution referred to providing for publication of its proceedings, and the city advertisements, in a paper to be designated for a term of three years, at a certain annual sum, and the current rates for advertisements, with authority to the city chamberlain to contract with the proprietors,—*Held*, that the resolution was in the nature of a proposal.

*Held*, also, the resolution having been entered in the minutes of the council, which were signed, in the discharge of his duty, by its clerk, and an acceptance in writing having been signed by the plaintiff and filed with the clerk, that there was a valid contract in writing, &c., under the statute of frauds.

*So held*, where both parties had acted under the agreement.

The fact that both parties proceeded with the performance is sufficient to warrant the conclusion that the clerk was either originally empowered to subscribe the resolution, in behalf of the corporation, and in that manner complete the memorandum required by the statute, or that his act in so doing was afterward ratified by the corporation. (Per DANIELS, J.)

*Chase v. City of Lowell* (7 Gray, 85), approved and followed.

And *held*, that if the resolution required a contract by the chamberlain, the requirement was waived.

It being required by the city charter that a resolution involving an appropriation or expenditure of moneys be passed by a two-third vote taken by yeas and nays and entered in the minutes,—*Held*, that the resolution did not require a vote in this manner, as the former one provided for the expenditure, and the latter provided a party who should perform the work.

APPEAL by the plaintiff from a judgment upon the report of a referee in favor of plaintiff against the defendant for \$459.16.

The plaintiff claimed that it was entitled to judgment for a larger amount than that awarded.

The following are the principal facts in the case, as found by the referee :

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The common council of the city of Albany, on the tenth day of December, 1862, adopted a resolution referring it to the printing committee of the council to consider and report as to the propriety of establishing an official organ for the city and the proper compensation for the same. This committee afterward reported a resolution that the proceedings of the board should be reported for, and published in, one daily paper, to be designated by the board at an annual expense not to exceed \$1,000, and that all city advertising should be published at the rates prescribed by law for the publication of legal notices in the same paper, the designation to be for the term of three years; also, that all printing and binding, chargeable to the city, should be done by the proprietor or proprietors of such paper, for the like term, at the rates current in the city, and that the chamberlain should be and he was thereby authorized to enter into contract accordingly with such proprietor or proprietors as the board might designate. This resolution was adopted on the twenty-sixth day of January, 1863, by a two-thirds vote, taken by yeas and nays.

The newspaper of the plaintiff was, on motion, designated as such official paper on the twenty-sixth day of January, 1863, and a contract in writing, pursuant to such resolution, was entered into between plaintiff and defendants on the twenty-seventh day of January, 1863, for three years from that date, such contract being signed and sealed on the part of the defendants by the chamberlain.

On January 16th, 1866, the common council adopted a resolution "that the *Argus* be and hereby is designated as the official paper, in accordance with the former resolution of the common council establishing an official organ for this city." This resolution was not adopted by a vote taken by yeas and nays, but it was entered on the minutes of the board, which were signed by the clerk of the common council, and, after the adoption of the resolution, the plaintiff subscribed a written acceptance thereof, which was filed by the plaintiff with the clerk of the common council January 27th, 1866.

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After such acceptance the plaintiff proceeded to publish the proceedings of the common council in the Argus, and continued so to do for the space of three years thereafter.

On the fourth day of June, 1866, the common council passed a resolution purporting to rescind that of January 16th, 1866, and also resolutions modifying that of January 26th, 1863, and awarding the printing, binding and advertising to three other papers.

After the adoption of these resolutions the plaintiff, by a written and printed notice to the common council, protested against such last named resolutions, and gave notice that it was ready to go on and fulfill on its part, and that it still considered itself the official organ, and was ready and willing and offered to do all the printing and binding referred to in the resolution of January, 1863, and upon the terms therein mentioned.

After June 4th, 1866, the defendants refused and neglected to furnish the plaintiff with any printing or binding under said resolution. The printing and binding actually awarded by defendants to other parties during the term of three years from January 27th, 1866, amounted at current rates to \$4,342.54, of which amount thirty per cent or \$1,304.75 was profit. The profit upon city advertising awarded to and done by other parties was \$1,500.

The referee found (1) that the resolution of January 26th, 1863, established a permanent official organ for the defendants, to be designated every three years; (2) that the resolution of January 16th, 1866, designating the Argus as such official organ, did not involve an appropriation or expenditure of money, or require a two-thirds vote to be taken by yeas and nays, but was legally passed; (3) that such resolution and the acceptance thereof by plaintiff constituted a contract between the plaintiff and defendant, by which the plaintiff was to be the official organ for three years, and was to publish the proceedings of the common council at the rate of \$1,000 per year, to do all the city advertising at the rates prescribed by law, and all printing and binding chargeable to



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the city at rates current in Albany, for said term of three years, which contract would have been valid and binding if executed as required by the statute of frauds; (4) that such contract, not being to be performed within one year, was within the statute of frauds, and was not subscribed by defendant, and is void; (5) that plaintiff was entitled to recover for reporting and printing the proceedings of the common council after the 27th of January, 1866, and before June 4th, 1866, the sum of \$105.55 and interest. The plaintiff excepted to the finding that the contract was void under the statute, and also to the finding as to the amount that plaintiff was entitled to recover, on the ground that the amount of the recovery should have been larger.

*Matthew Hale*, for the appellant.

*N. C. Moak*, for the respondent.

Present—MILLER, P. J., DANIELS and DANFORTH, JJ.

MILLER, P. J. The findings of the referee and the evidence in this case establish that the plaintiff fulfilled all the obligations imposed by the contract made with the defendants, so far as he was allowed to do so by the defendant, and was entitled to recover therefor, unless precluded by the operation of the statute of frauds.

The resolution passed by the common council of the city of Albany on the fifteenth day of January, 1866, designated the plaintiff's newspaper as the official paper of the city, in accordance with former resolutions establishing an official organ. Soon thereafter the plaintiff filed a written acceptance of the terms of said resolution with the clerk of the common council, and thereby became entitled to the benefit thereof for the term of three years, unless the contract was void because it was not in writing, so as to take it out of the statute of frauds. The learned referee found that the resolution and acceptance constituted a contract between the

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plaintiff and the defendant by which the plaintiff was to be the official organ for three years, and to publish the proceedings and do the printing as required, which would have been valid and binding if executed as required by the statute of frauds, but not being to be performed within one year was within the statute, as it was not subscribed by the defendant, and void.

According to the referee's finding the case presents the single question, whether there was a valid subscription to the contract by the defendant. I think that he erred in his conclusion, and for this error there must be a new trial.

The rules applicable to contracts of this character are well settled. According to the statute the agreement, or some note or memorandum thereof, must be in writing, subscribed by the party to be charged therewith (2 R. S., 135, § 2), or by the lawful agent of such party (2 R. S., 138, § 8). It is not essential that the contract should be a single instrument. (*Wright v. Weeks*, 25 N. Y., 160.) And a proposition containing the terms of a contract signed by one party, and an acceptance by the other in writing, is sufficient to constitute a complete contract. (*Vassar v. Kamp*, 1 Kern., 441; *Haydock v. Stow*, 40 N. Y., 367.) In the case at bar the resolution of the common council was in the nature of a proposal, signed by the clerk in the minutes, and the writing signed by the plaintiff and filed with the clerk was an acceptance of the proposition made, which made a perfect and complete contract.

In thus signing the minutes of the common council, I think that the clerk was the lawful and authorized agent of that body, and that as such his act is obligatory upon them. He is an officer authorized by law to discharge certain duties (S. L. of 1842, chap. 275, § 11), and it was entirely within the range and scope of such duties to keep the minutes of its proceedings, to enter resolutions adopted and to affix his signature to them. In this respect he was their agent and officer, vested with full power and authority for such a purpose. It was not necessary that he should have authority to

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make the contracts, and enough that he was a lawful agent for the purpose of subscribing his signature to the same.

A party may authorize another to subscribe his name to a contract as the agent of such party, without conferring power to enter into a contract.

The common council, as the representative of the corporation of the city of Albany, had authority to make such a contract, and it was the duty of the clerk, as their agent and officer, to enter the resolution by which the contract was intended to be made in the minutes which he kept, and to affix his name to this as well as to all other proceedings which that body might adopt. This being done, I am of the opinion that the entry and signing by the clerk was a subscription by the lawful agent of the common council, having ample authority for that purpose, which was quite as effectual and obligatory as if the resolution had been signed by all of the members thereof, and that the entry and subscription by the clerk in connection with the acceptance in writing of the plaintiff filed with that officer, rendered the contract complete and effectual. Where the members of a municipal corporation, lawfully convened by resolution, authorize a party to perform certain work, and such resolution is duly entered and subscribed by the proper officer who is vested with power for that purpose, and a written acceptance is filed by the party by whom the work is to be done with the officer who has thus acted as agent, it is difficult to see why there is not a valid contract which can be enforced. In the case at bar there is a proposal and acceptance, each of them signed, which together take the contract out of the statute of frauds and the evils which it was designed to remedy. Under such circumstances, where a proposition has been made and accepted, and both parties have acted, it cannot, I think, be claimed that the case is in any way analogous to one where an instrument executed by a party has not been delivered and therefore is not obligatory as a contract. (See *Robinson v. Cusman*, 2 Den., 153; *Jackson v. Little*, 12 Wend., 105.)

The question, whether the clerk was vested with power to

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bind the common council by his signature, has been substantially decided in the Supreme Judicial Court of Massachusetts, in *Chase v. The City of Lowell* (7 Gray, 35). The case shows that the city council of Lowell, on the 20th of February, 1854, authorized the joint committee upon streets "to contract with and employ a suitable person for city engineer for the ensuing year, or for such time as they may deem expedient, at a rate of compensation *not to exceed one thousand dollars* per year, and also to employ a clerk for the service of the committee." The committee subsequently chose the plaintiff as their clerk for the "present municipal year," and city engineer for one year from the first of April following. The votes of the members of the committee were entered on the record and *signed* by the plaintiff as their clerk, and there was no other evidence either in the record or otherwise that the committee ever fixed the amount of compensation which the plaintiff should receive in either capacity. In October, 1854, the city council passed an ordinance which provided, among other things, that a city engineer should be chosen by the city council in the month of January, annually, and might be removed at any time by vote. The plaintiff continued to discharge the duties of the office of city engineer until January, 1855, when he was notified of the election of a successor, and afterward held himself in readiness to perform such duties until April 2d, 1855. The plaintiff brought an action to recover the last quarter's salary, and the objection was taken to a recovery, that the plaintiff's agreement with the defendant as engineer was not to be performed within one year from the making thereof, and therefore the statute of frauds was a defence to the claim. The objection was overruled and the plaintiff recovered the amount claimed. The court say: "But if that agreement was within the statute, we are of opinion that the recorded vote of the committee on streets, passed on 21st of February, 1854, and signed by the plaintiff as clerk, was a sufficient note or memorandum thereof in writing."

In the case cited, as in the case now considered, the rate of

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compensation per annum was "not to exceed" a certain amount, but the case before us is far stronger than the one cited, as it appears that in the Massachusetts case the resolution was that of a committee and not the common council, and the clerk who made the entry was the plaintiff in the action. The case is directly in point, and covers the question now considered.

The case cited also holds that the appointment by a city council, for a definite time, of a city officer or agent entitled to compensation for his services, if accepted by him, when no law prescribed a different time for the duration of the office or agency, constitutes a contract between him and the city, which cannot be changed by a subsequent ordinance of the city and vote of the common council without his consent.

If a contract was created by the resolution of the common council, then clearly there was no power to avoid its legitimate effect by subsequent proceedings declaring that the contract made was of no effect and by selecting other newspapers to perform the services required.

The defendant's counsel seeks to sustain the judgment upon grounds which are directly adverse to the second and third conclusions of law of the referee and the views expressed in his opinion.

He insists that the resolutions were not binding upon the defendants, because, 1st. They were not definite, and did not of themselves nor without resort to extrinsic evidence fix the terms of the contract and the sums to be paid; and, 2d. Because the resolution provided that a contract should be made by the chamberlain with the proprietors of the paper.

The referee, in his opinion, considers that the contract to report and publish the proceedings of the board at an annual expense, not to exceed \$1,000, was consummated by the designation or offer to that effect by the board and its acceptance by the plaintiff; that this was in substance a contract to do this service for that sum per annum. He also states that in this case no intervention of the chamberlain was required, and that the legal effect of the action of the board

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was to offer the work to this plaintiff, and the plaintiff accepted the offer. I concur with the referee in the construction placed upon the resolutions; and although the last resolution refers to the former resolutions in general terms, yet, as it contained no specific provision for a distinct contract, it may, I think, be regarded as a mere offer of the work at a price and at rates which were stated in the former resolutions, which became settled, so far as any given amount was named, by an acceptance of the proposition in writing, filed with the clerk. The agreement thereby became fixed to pay the amount named in the first resolution for reporting and publishing the proceedings, and certain other rates for other work, as therein stated.

This construction was placed upon the expense of publishing the proceedings, by the payment by the chamberlain to the plaintiff, of one quarter's salary at the rate of \$1,000 a year, thus fixing that amount.

It may also be remarked that it is quite apparent that the object of the direction, that the chamberlain enter into a contract with the proprietor of the newspaper designated by the board, was to secure an acceptance which would bind the proprietor, and not a condition upon the performance of which the validity of the contract depended. This object was accomplished by the written acceptance, filed with the clerk, and the intervention of the chamberlain, therefore, was not required. But even if a condition existed, it was waived by the acceptance in writing of the plaintiff, filed with the clerk. Both parties agreed to this as a substitute for a contract with the chamberlain, and acted upon it accordingly.

It is further insisted that the resolution under which the plaintiff claimed was void, because the yeas and nays were not entered upon the journal as required by law. (S. L., 1848, 217, § 1.) The referee found adversely to the defendant in this respect, and I think was clearly right. The resolutions first passed created a permanent official organ, and made provision for paying the expenses attending the same.

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The last resolution merely designated an organ for the next three years, without adding to the expenditure which had previously been provided for. It merely filled a position already created, and included in the previous action of the common council.

As the amount which the plaintiff is entitled to recover may be changed by additional evidence upon another trial, this is not a case where the facts authorize the court to direct a judgment for the amount claimed by the plaintiff.

The defence interposed cannot be maintained, even on strict legal grounds; and it comports with justice as well as the law to direct that, for the error of the referee, the judgment be reversed and a new trial granted, with costs to abide the event.

DANIELS, J. The judgment in this case should be reversed and a new trial ordered because the signature of the clerk to the resolution designating the Argus as the official paper of the city was the signature of the defendant's agent to the contract proposed by that resolution, and the one previously adopted in 1863. That, under the statute, was sufficient to constitute a compliance with its provisions. For every instrument required by any of its provisions to be subscribed by a party may be subscribed by the lawful agent of such party. (3d R. S., 5th ed., 222, § 8.)

And the fact that both parties afterward proceeded with the performance is sufficient to warrant the conclusion that the clerk was either originally empowered by the defendant to subscribe the resolution in its behalf, and in that manner complete the memorandum required by the statute, or that his act in doing so was afterward ratified by the defendant. And either would be sufficient to render the subscription by the clerk the act of the defendant. For the ratification by the principal of the unauthorized act of an agent is equivalent in its effect to an original authority to perform the act itself. (*Hoyt v. Thompson's Ex'r*, 19 N. Y., 208, 218, 219.)

That made it the memorandum of the defendant, and,  
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within the case of *Chace v. City of Lowell* (7 Gray, 35), bound that body to its performance as a lawful contract. For although it may have been contemplated by the resolution of 1863, under which the designation was afterward made by the resolution of 1866, that a more formal contract should be entered into on behalf of the city by its chamberlain, the parties could waive the performance of that provision. And they seem to have done so by entering at once upon the performance of the agreement indicated by the resolution subscribed by the clerk, and its acceptance by the plaintiff. They had a right to waive the making of a formal contract, as long as the acts which were performed were sufficient to constitute the statutory memorandum, for that was as binding upon them as the most formal and detailed agreement which could have been drawn. And that they both intended to and did dispense with the making of any formal contract afterward, are fully shown by the subsequent acts and conduct of the parties under the memorandum which was made. For these reasons, as well as those fully discussed in the opinion of the presiding justice, MILLER, I concur in directing a new trial of the action.

New trial granted.

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THE PEOPLE ex rel. EDMUND L. JUDSON, and the said EDMUND L. JUDSON, Appellants, v. GEORGE H. THACHER, Respondent.

(THIRD JUDICIAL DEPARTMENT, GENERAL TERM, MAY, 1873.)

Where the certificate of inspectors of election shows fewer votes canvassed than appear by the poll list to have been cast, and the proof is that two of three candidates (who have all the votes canvassed) received respectively more votes than the certificate gives them, and there is evidence tending to show fraud,—*Held*, that the remaining votes appearing on the poll list, which is unquestioned, although less than returned for the third candidate, should not be counted for him. (MILLER, P. J., dissenting.)

Accordingly where it appeared, in an action brought to try the title to the office of mayor, in the city of Albany, that by the poll list of one of



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the voting districts there were cast 729 votes for that office; that while the votes were being counted the gas-light went out, and on counting the ballots, after it had been relighted, it was found that there were only 652 ballots for mayor, of which 460 were for T. and the balance for two other candidates, and the inspectors made their return according to this count, and it was also shown by oral proof that 384 voters had voted for the candidates, other than T.,—*Held*, that it was error to charge the jury that the number of votes proved to have been cast for the candidates, other than T., should be deducted from the larger number of votes cast at the poll, and not from the smaller number of votes canvassed. (Id.)

The court might, *it seems*, if there were evidence on the subject, have submitted to the jury the question, whether the seventy-seven votes were cast for T.; and instructed them that, if they found they were, they should deduct the number found to have been given for the other candidates from the whole number of votes cast. (Per PARKER, J.)

*Held*, also, that the return might be rejected, without respect to the question whether the inspectors had been concerned in the fraud.

And accordingly, if, during the interval between the going out of the gas and its being relighted, ballots had been taken from the table and others substituted by persons other than the inspectors and without their complicity, and it was entirely uncertain to what extent this had been done, it would be sufficient cause for setting aside the return; and there being evidence tending to show this, it was error to refuse to charge to this effect. (MILLER, P. J., dissenting.)

*Held*, error, also, to charge that the jury must be convinced "that there was intentional fraud on the part of the inspectors, and such fraud as altered the result in order to set aside the return."

APPEAL from a judgment entered upon a verdict and from an order denying a new trial.

The action was in the nature of a *quo warranto* to try the title of the defendant to the office of mayor of Albany, to which office the defendant was declared to have been elected on the second Tuesday of April, 1872.

The official canvass showed the vote in the city for mayor to have been as follows, viz.:

For George H. Thacher .....	6,588
“ Edmund L. Judson.....	6,387
“ Thomas McCarty.....	2,157

The plaintiff claimed to have been legally elected to the office, notwithstanding the result declared upon this canvass.

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A verdict was rendered in favor of the defendant. The facts are stated in the opinion of PARKER, J.

*L. Tremain*, for the appellants.

*M. Hale*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—PARKER, J.. This is an action commenced by the People upon the relation of Edmund L. Judson, and by the said Judson against the defendant, in the nature of a *quo warranto*, to try the title to the office of mayor of the city of Albany.

The action was tried at an adjourned circuit in Albany, in September, 1872, and resulted in a verdict for the defendant.

A motion was made for a new trial upon the minutes of the judge who tried the cause, which was denied. Judgment in accordance with the verdict was entered; and from such judgment, and the order denying plaintiff's motion for a new trial, the plaintiff appeals to the General Term.

The plaintiffs ask a reversal of the judgment and a new trial, both upon the facts and upon exceptions to errors of law alleged to have been committed upon the trial.

The certificate of election was given to the defendant. This, *prima facie*, entitles him to the office; but it is open to proof that the official canvass and certificate were not correct, and that the person so certified was not in fact elected to the office. (*The People v. Cook*, 4 Seld., 67.)

Without going at much length into the evidence, it must suffice to state that the controversy, in regard to the correctness of the canvass, is confined to that in the southern district of the Fourth ward. In that district 729 votes were given for mayor, according to the poll list. While the votes were being counted, by gas-light (having been turned from the box upon a table), the light suddenly went out; and before the gas was relighted, it is alleged by the plaintiff

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that the ballots upon the table were interfered with by some person or persons, and some of them abstracted, and votes for Thatcher substituted. Evidence was given tending to show that such was the case. It turned out that, upon counting the ballots upon the table, after the gas was relighted, there were only 652 for mayor, of which 460 were returned for Thatcher, 114 for Judson and seventy-nine for McCarty, being in all less by seventy-seven than had been put into the box for mayor, according to the poll lists.

Evidence was given, by the testimony of voters themselves, tending to show that 200 voters voted for Judson for mayor in this district, and 134 for McCarty. Deducting the sum of these from 652, there are left only 318 for Thatcher, making his majority in this district, according to the returns thus corrected, 118.

Judson received a majority in the residue of the city, outside of this district, of 146. If Thatcher's majority in this district was only 118, it follows that Judson was elected mayor by twenty-eight majority. But if the 334 votes for Judson and McCarty in this district are to be deducted from the whole number of votes cast for mayor, shown by the poll lists, 729, there are left 395 for Thatcher (if they are all to be counted for him), making a majority of 195 over Judson in the district, electing Thatcher mayor by forty-nine majority.

In charging the jury the court say: "I see no reason why you should deduct the number of votes proved to have been cast for Judson and McCarty from the *smaller* number of votes *canvassed*, and not from the *larger* number of votes cast at that poll." This was excepted to by plaintiff's counsel; and it appears to me that the plaintiff's position, that it was erroneous, is correct.

The *canvass* of the inspectors is to be taken as *prima facie* correct, but when we get beyond the canvass, which gives 652 as the number of votes cast at that poll for mayor, we are beyond the range of such *prima facie* evidence of correctness. The canvass does not show that the seventy-seven votes, not included in it, were given for Thatcher.

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It says, the whole number of votes for the office of mayor was 652, *of which*

George H. Thacher received.....	460
Edmund L. Judson received.....	113
Thomas McCarty received.....	79

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 652

It is this return that is corrected by proof that Judson received 200 and McCarty 134. For whom the seventy-seven other votes were cast, does not appear from the return. So that Thacher is not *prima facie* entitled to them.

Doubtless, if there is evidence on the subject, the court might have left to the jury the question whether the seventy-seven votes were cast for Thacher, and instructed them, if they found they were, that they should deduct the 334 votes from the whole number of 729. But these seventy-seven votes were not shown by the returns to have been given for Thacher, and the court was wrong in assuming, as the charge did, that they were given for him.

The court charged the jury on the subject of fraud upon the ballot-box, whereby the result was changed, as follows: "You are to find whether fraud was committed. I do not speak of the misconduct of outside parties, but you are to examine and see whether intentional fraud was committed by the inspectors. I can see nothing else than the intentional fraud of the inspectors which would justify you in entirely setting aside the canvass. It must be a conviction in your minds that there was intentional fraud on the part of the inspectors, and such fraud as altered the result, that is necessary in order to set aside the entire return." To this plaintiffs' counsel excepted. Plaintiffs' counsel requested the court to charge as follows, viz.: "If the jury believe from the evidence that, preceding or during the canvass of the mayor's box, ballots for mayor were either illegally abstracted from the box or table, or placed in the box or on the table, and it is entirely uncertain to what extent this was done, then the returns should be rejected, and each candidate credited with

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the votes otherwise proved to have been cast for him, although none of the inspectors were concerned in the transaction."

This was refused, and the refusal excepted to, and I think sufficiently excepted to, although defendant's counsel makes the point that it was not.

Both of the exceptions last mentioned relate to the same alleged error of the judge in holding that no fraud upon the ballot-box, committed by any one except the inspectors, could avail to set aside the return entirely, and throw the parties upon other proof of their votes in that district.

I think the holding was wrong in principle, and wrong as applied to this case. There is evidence to make it a proper inquiry for the jury whether, during the interval between the going out of the gas and its being relighted, ballots were not taken from the table and others placed upon it, by persons other than the inspectors, and without their complicity. If this was done, so that the result of the voting at the poll was rendered entirely uncertain, it was sufficient cause, I think, for setting aside the return.

Without pursuing the inquiry upon the questions raised in the case, the errors committed as above stated are sufficient to entitle the plaintiffs to a reversal of the judgment and order, and a new trial, which should be ordered, with costs to abide the result.

POTTER, J. The mass of evidence contained in this voluminous case was hardly referred to upon the argument, and becomes nearly useless upon this review. The decision will mainly depend upon a state of undisputed facts, conceded upon the argument, or taken from the charge of the learned judge to the jury. The action is to try the title to the office of mayor of the city of Albany. It is a question which, though instituted in the name of the people, is really to settle a right between the relator and the defendant, as individuals. The legal title to this office depends upon ascertaining the truthful expression of the popular will of the electors of the

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city of Albany. Such an action as this is a proceeding peculiarly appropriate, and especially adapted to try the question of title to an office. It allows the parties to look beyond the mere prescribed forms by which results are in the first instance to be ascertained, and allows the actual will of the electors to be shown. It does not exclude the oral proof by the electors of their expression of choice nor allow their will to be defeated, either through prescribed forms of law or through the negligence, mistake or fraud of those who are appointed to register the results of an election, nor even the frauds of others which may defeat or destroy the expression of the sovereign will.

The right to hold an office is a sacred right, derived from the highest source of political power known to our form of government. It is a right secured by the popular voice expressed in the forms of popular sovereignty. The trial of such an issue at law is an inquiry into that right. It is, like other issues, to be determined by established rules of evidence which are intended for the establishment of truth, and its investigation is not shackled by or confined to forms alone. At common law, where, as in this case, the people are a party, the certificate of the board of inspectors is, first, *prima facie* evidence of the truth of *such* statements as they are permitted or directed to certify. But it is only *prima facie* evidence; it is not conclusive; and like all other merely presumptive evidence, it is subject to be overcome or destroyed by better, higher or more certain evidence, and may be entirely so overcome or impeached. In this country it is the actual expressed will of the electors, not the certificate of inspectors, that confers the title to an office. It is *truth*, not *form*, that confers the right. (*People v. Cook*, 8 N. Y., 68.) What is sufficient to impeach the presumption created by an inspectors' certificate, how long it continues to have legal vitality, how long the *onus probandi* remains with the relator, are perhaps the most important legal questions arising in this case. From the charge of the learned judge, as well as from concessions made on the argument, the whole contro-

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versy is limited to the votes cast by the electors in the southern district of the Fourth ward of the city of Albany.

Excluding that district in estimating the result, it was conceded that the relator had a majority of 146 votes for the office of mayor from the aggregate vote of all the other districts in the city. Taking the certificate of the inspectors of election of that district as evidence of the result, the defendant would be elected by a majority of 201 votes. This statement embraces the whole scope of the controversy, so far as it is here for review. If, then, by legal evidence, or by admissions made upon the trial, this certificate of the inspectors does not express the true result of the electors' choice—if its effect is so destroyed or impeached by better proof that it ceases to have force as evidence—then the result in that district must be determined by other and the best evidence that the nature of the case admits of.

If this certificate is proved to be false, if its falsehood is conceded or not controverted, if a state of facts is shown which proves that the result in that district was uncertain, and if it was shown that it was not in the power of the inspectors to render it certain, then it amounts to no evidence to defeat that which is better. When the truth has been so far inquired into and ascertained as to show that the certificate is not true, can it be the duty of the court to hold that, though false and uncertain, it may still be used as evidence? Can such a paradox be introduced into the law, as that a thing false in fact may be true as evidence? Or this, that an official certificate, proved to be beyond the power of the officer to make certain in what it contains, shall still be held to be certain because it is certified? I think not. If such rules are not found to be established by authority, surely they should not be now first introduced to thwart that inestimable right of a free man, the right to hold an office when such right is proved by the best evidence to be the will of the legal voters.

This case in its features is novel. It is distinguishable from all the cases found reported in some respects. It is not

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a case of mere irregularity so common in the books, which cast no uncertainty upon the result, or none but such as can be rendered certain. It differs from the case of *The People v. Mink* (27 N. Y., 539). In that case no evidence was offered to impeach the certificate, and it was, of course, held good, *prima facie*. Nor is the case of *The People v. Pease* (27 N. Y., 45) at all in point upon the question we are considering. That case only establishes the just rule that a party may go behind the certificate of the inspectors and prove upon a trial before a jury, by the best evidence that the nature of the case will admit of, what is the people's *will*, what is the *truth*, and may correct any error occurring by reason of any *negligence, mistake, or fraud* of the inspectors or others. But none of these cases lay down a rule to apply where error, mistake, negligence or fraud has produced an uncertainty in a canvass beyond the power of being corrected. The only case, or rather the highest authority and latest case that gives a rule in such an event, is *The People v. Cook* (8 N. Y., 94). That case says: "If it be impossible for the inspectors to ascertain, certify and declare the number of genuine ballots, the whole should be rejected."

The certificate of the board of inspectors produced in this case shows that 652 votes were cast in this disputed district for the office of mayor, and that of these 460 were cast for the defendant, George H. Thacher, 113 for the relator, Edmund L. Judson, and 79 for one Thomas McCarty. This certificate, standing alone as *prima facie* evidence, would show the defendant elected to the office. The burden of proof to overcome this *prima facie* case, it is conceded, was then upon the relator. How, then, may this *prima facie* case be overcome, and what evidence is sufficient to destroy its effect?

The relator proceeded to attack the verity of the inspectors' certificate. He showed by better and higher evidence, to wit, that of the electors themselves, that he received in that district 200 votes for that office, and that Thomas McCarty received 134 for the same office. As, *prima facie*, but 652 votes were canvassed by the inspectors, this higher evidence



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than the *prima facie* certificate left but 318 votes for the defendant, thus still electing the relator. It was never heard of before in the law of evidence, I think, that there could be allowed to a party, even as *prima facie* evidence, a large number of votes not canvassed for him, and that, too, without oral or other proof that they had been cast for him—that the *prima facie* evidence of a certificate, even after its impeachment, was sufficient to overcome the higher and better positive evidence that had impeached, contradicted and destroyed it.

It is not denied that the relator showed this certificate was false in its statement of the number of ballots cast for that office, in this, that the actual number was 729, not 652, nor was it urged. It could not be urged that the inspectors did not know that their certificate in that respect was untrue. If a state of circumstances existed at the canvass by which a part of the ballots were destroyed or abstracted, or the result made uncertain, the duty of the inspectors was plain. It was a duty consistent with truth—consistent with official integrity. That duty was honestly and truthfully to certify and declare the fact which produced the uncertainty. (*People v. Cook*, 8 N. Y., 94.) There is no law, no official obligation, that requires a sworn officer to certify untruthfully, because he cannot certify the truth, or in the absence of certain knowledge to guess at a result.

It would have been honest, it would have been consistent with official integrity, it was due to truth and justice, due to the highest public interests, that this board should have certified to the fact of the sudden and mysterious darkness that happened during the canvass, to the certain abstraction of votes, and for aught they knew also to a change or substitution of votes, and to the uncertainty of the result. At all events, an honest, truthful certificate would have shown that the result was made uncertain.

It is undisputed that the canvass for mayor was out of the legal order of time. The box containing these ballots was the fourth canvassed. The votes canvassed in that box had

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been all turned out of the box upon the table and lay in heaps before the inspectors, and were then being opened. While in this condition, a condition of all others most susceptible to the commission of a fraud, and while the inspectors were surrounded by persons of doubtful repute, the gas-light was suddenly extinguished. Though candle-light was very soon obtained, and though during the darkness some of the inspectors honestly endeavored to secure the ballots from being interfered with, there is proof, certain proof, that they did not entirely succeed. They were interfered with by some person or persons during the moments of darkness. Certain it is that when the light appeared votes had been abstracted. Ballots were found strewed upon the floor under the table, and one of the inspectors was found away from the place he occupied at the table when the light went out, and there was very strong circumstantial evidence that different votes were substituted for the votes cast. Upon counting the votes found on the table after the light was restored, but 652 votes was found, though 729 had been cast in the box by the electors. The inspectors might have truthfully certified that from the votes found upon the table and afterward canvassed, the following was the result. Though the law furnishes no such form, truth required it. But their certificate was not made in the honest form suggested and as required by duty. It was shown by the testimony on the part of the relator, and not controverted by other evidence, that the result as certified was not true.

The relator further impeached this certificate by affirmative proof that 200 electors of that district voted for him, thus falsifying the return to the extent of eighty-seven votes, and by like evidence that 136 electors in the same district on the same day voted for Thomas McCarty for the same office, thus further impeaching this certificate and return to the extent of fifty-seven votes. The legal question then arises as to the effect of this *prima facie* evidence of the inspectors' certificate after being thus falsified and impeached. Is it then still in force? Though false, is it still legal evidence? Is the

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*onus probandi* still upon the relator further to impeach a thing proved and conceded to be false and uncertain? It was neither true in fact, nor had the inspectors the means of making it certain and certifying a true result. They did not know that all the votes they canvassed and thus certified had even been in the ballot-box. They *did* know that all the votes that had been in the ballot-box were not canvassed. Admitting the certificate of the inspectors was *prima facie* evidence of the result in the first instance and that the burden was first upon the relator to impeach it, yet when it became so impeached, both for its untruthfulness known to the inspectors, and impeached in that the result of the ballot was not only uncertain, but the inspectors did not possess the means of making it certain, what, then, is the legal effect? On whom, then, is cast the burden of proof? Upon these points there was no conflict of fact for the jury. This became in this case, as it may become in others, a grave question—a question upon which great interests under our form of government may depend. It is a question that should have for its basis the support of integrity and truth—a question that lies at the very foundation of our system of government. Upon the decision of this question depends, or may depend, the means of detecting and exposing fraud and imposition—a question of the purity of the elective franchise—a question involving the sovereign right of the people. It should be so held as to be the means of correcting error and of securing the confidence of the people in the ultimate result of an election. Was it needful for the party attacking the verity of an official certificate, which is at most but *prima facie* evidence—a ministerial, not a judicial certificate—to go further than to prove it false and uncertain?

What is *prima facie* evidence? It is an inference or presumption of law affirmative or negative of a fact, in the absence of proof, or until proof can be attained or produced to overcome the inference. Starkie defines it to be “that which not being inconsistent with the *falsity* of the hypothesis, nevertheless raises such a degree of probability in its

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favor that it will prevail if accredited by a jury, unless it be rebutted or the contrary proved." (Vol. 1, p. 544.) It is certainly the weakest of all evidence upon which legal action can be sustained, and ceases to be sufficient when rebutted or impaired by contrary and better proof. In this case the *prima facie* evidence is that only 652 votes were cast for mayor at that poll; *prima facie* only 113 were cast for the relator, and only seventy-nine for McCarty. In these respects it was rebutted and proved untrue. This certificate, then, was uncertain and untrue. The *prima facie* presumption of verity of the certificate then was overcome, destroyed. The only question that remains is, does any virtue still remain in this false document, which shall so control as to overthrow the truth and nullify this highest right of the citizen, that of enjoying the exercise of popular sovereignty, that of rights conferred by a pure and honest exercise of the elective franchise? I have found no authority in the jurisprudence of any civilized country that allows of an action being maintained or defended upon evidence admitted to be untrue. The nearest approach to such a rule is in the old English doctrine of libel: "The greater the truth the greater the libel," or *e converso*, "the greater the libel the greater the truth." In the jurisprudence of this country, and in the trial of causes, a more reasonable doctrine prevails, as I understand the rule.

In the examination of contested questions of fact, the *onus probandi* may in the course of the trial be thrown from one party to the other several times, according as the complexion of the proof may change. (*Ross v. Gould*, 5 Greenl., 211.) The books are full of illustrations and examples of this kind. Take the familiar case of a negotiable promissory note payable to bearer. The production of the note and proof of signatures of maker and indorsers is *prima facie* evidence that it was given in the usual course of business and for value; but if the defence shall show that the note was obtained by fraud or an illegal consideration, or without consideration, the *onus probandi* is changed, the *prima facie* evidence is destroyed, and the burden is then cast upon the

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plaintiff to show under what circumstances he obtained the note. The nature of the action, the pleadings and the proofs on trial, are to be considered in all cases in determining upon whom the *onus* lies at any given stage of the trial. (Phil. Ev., C. & H., notes by Edwards, vol. 1, 684.) If a question of fact remains in a case, or there is conflict, then it is a question for the jury; but where the fact is undisputed, when the falsity or uncertainty of the *prima facie* evidence is conceded, and when the proof is without contradiction, as in the case before us, that the official certificate is untrue, when it is certain that it cannot be true—when the extent of its falsity is uncertain—then it is for the court to decide upon whom the *onus* lies. I think the *prima facie* presumption of its verity is then destroyed; that there is nothing left then to sustain it. It is then impossible from the canvass and certificate to ascertain the number of ballots given for either candidate. If such uncertain result is produced with or without the fault of the inspectors, their duty is then clear. The Court of Appeals have prescribed what is then the duty of the inspectors. That duty is, not what was done in this case. It was not to certify to a falsity; not to certify by guess work when it was uncertain; not to certify to what they knew was untrue, but to certify and declare the fact which produced the uncertainty. (*People v. Cook*, 8 N. Y., 94.)

It is clearly apparent, I think, that the case was submitted in part to the jury upon a mistaken theory of the law as to the legal force and effect of the inspectors' certificate. The learned judge correctly charged the jury first that the formal certificate of the canvass was sufficient evidence to begin with, that *prima facie* the party receiving it is entitled to the office, and also "that it rested with the plaintiff to show affirmatively that he is entitled to the office." "And to do that he must show that the result stated in the returns is not correct." It is conceded that the plaintiff did show that the result stated in the return was not correct.

It is conceded that the relator had 146 votes majority,

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independent of that district, and by the highest proof it was shown that he received 200 more of ballots in that district for the same office. I assume, then, for so I hold the rule to be, that when the inspectors' certificate ceased to be *prima facie* evidence, when it was not only admitted, but proved to be both untrue and uncertain, its legal force, its *prima facie* presumptive character, had been destroyed.

It no longer proved the defendant entitled to the office. It remained then evidence of nothing but its falsity.

The canvass of the district was then, in law, a blank, so far as this certificate was in question, and so far as there was any legal evidence then remaining of its result. Then the relator stood with 146 majority without that district, and this was increased by better legal evidence of 200 votes in addition within this district.

Resting there, the relator was entitled to the certificate of election. Resting there on the trial, until these 346 votes should be overcome by legal proof, he was entitled to a verdict. The *onus* had then been changed, and it rested upon the defendant to overcome this majority.

The *prima facie* evidence upon which the defendant had stood had now ceased to be evidence for him. He had no *legal* evidence, then, of his election.

The defendant did not show upon the trial, but by this inspectors' certificate and return (except upon the cross-examination of a few of the relator's witnesses), that he received any votes in that district at the election.

The test laid down by Phillips, as to which party has the *onus* at any given stage of the trial, is "to consider which party would be successful if no more evidence were given." (Vol. 1, 812.) This was then a question of law, a question for the judge, and he assumed it. He instructed the jury "that in this aspect of the case that they are not to assume anything against the canvass and return which is not proved against them."

Stopping here, in one sense this instruction was well enough. But falsehood and uncertainty had then not only

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been proved, but was conceded. The jury should, therefore, have been charged to assume it. Enough had then been proved against it. But the learned judge did not stop there. He added, "that only so far as error is proved is it to be taken into the calculation." The idea here communicated is, that though the canvass and certificate is false and uncertain, you are still to regard it as good, true and legal evidence in its effect; that neither falsehood or uncertainty, as a whole and in general, are sufficient to destroy it any farther than to the extent its falsehood is proved in detail by the relator; that the *onus* still remains with the relator further to impeach it; that is, to impeach falsehood. The sound old maxim, "*falsus in uno, falsus in omnibus*," by this rule is ignored as having no application in such case.

Let us see whether this theory is sound, and how, if established as a rule, it will work in practice. Suppose the inspectors' return, instead of certifying that only 652 votes for mayor had been given, which was untrue to the extent of seventy-seven votes, had certified that 1,000 votes had been cast for the same office, which would have been equally untrue to the extent of 271 votes; and suppose, further, that the defendant's majority had been certified at just 271, just the extent to which the certificate was actually false; no possible truth, proved by the relator by the highest evidence, according to this charge could entirely overcome the *prima facie* evidence of this certificate. "*Only so far as error is proved is it to be taken into calculation*;" so is the charge.

It still remains evidence, sufficient to confer an office. Could it be tolerated? Could it be held to be a sound rule as to the *onus probandi* in the admission of evidence, in an action to ascertain the true expression of the will of the electors (as a rule to be adopted in practice, while in the search for the truth as to the electors' wishes, expressed by their votes), to hold that the *form and statement* of the inspectors' certificate, conceded to be both untrue and uncertain, shall, nevertheless, stand good, stand as truth, stand as legal evi-

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dence, except to the extent that the voters are called upon to contradict it?

In the supposed case of a certificate, false to the extent of 271 votes in excess of the actual number cast, by the rule laid down in the charge above given the falsehood could not be overcome by truth. The 271 votes not actually given, but certified, are made equal—more than equal in law to 271 votes actually given. The impeachment made in this case, by the 200 voters who swore they voted for the relator, would not be equal to the known conceded falsity in the return and certificate of 271 votes in excess of the true number. This would be a rule that truth is not equal to falsehood, if that falsehood is only found in an inspectors' certificate. The true voice of the electors, proved by themselves, would thus be silenced by the conceded false certificate of the inspector; though the former is true and the latter conceded to be false, the latter shall prevail. Elections, then, in future, are to be determined by *certificate*, not by *votes*.

But the case is even worse than this. With no *certain* evidence as to the number of votes that were cast in that district for the defendant, the learned judge instructed the jury that they had the right to allow to the defendant as votes given to *him* all the votes cast for mayor which were not actually proved by witnesses to have been given for others; not merely the balance of the 652 votes certified, but also the seventy-seven votes not even certified, and not canvassed at all by the inspectors. There is no inspectors' certificate, and, therefore, no *prima facie* evidence as to these seventy-seven votes. Upon what evidence, upon what *legal* ground, then, could these seventy-seven votes, not canvassed or certified, be allowed to one of the parties? This, I think, is an erroneous theory. The objections to this theory sufficiently appear in the exceptions to the charge and in the refusals to charge as requested, which I do not stop to detail.

I have not regarded it as at all necessary to examine the rulings of the court in the admission or rejection of evidence



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on the trial, nor the facts upon which frauds are charged against the inspectors, or of the persons surrounding them during the canvass, nor the evidence given in attempting to account for any abstraction or loss or changes of ballots, nor for the remarkable discrepancy between the ballots cast by the electors and the number canvassed by the inspectors. That votes were abstracted is not controverted. It is hardly questioned on the argument that ballots were changed. It is not denied that the result was uncertain. It is clearly proved that the relator's vote was not truly certified.

I have adopted the conceded facts in this review; have examined somewhat the theories of the parties and of the court upon the trial, and of the counsel upon the arguments before us. In the views I express I intend to give no opinion upon the merits of the case farther than appears from such facts and theories ascertained on the trial, and as confined to this one district. I have expressed my dissent from some of the legal views taken upon the trial, and propose to add some others, the result of which will be that legal errors were committed that require a new trial in the case. I base no part of my opinion upon the mere irregularities of the board of inspectors as a board, or of individual misconduct of inspectors, or of their clerks, in taking or receiving votes, or in the illegality of the order of canvassing the boxes of ballots, short of actual fraud. All such mere *irregularities*, which are not of themselves shown to have changed the result, as distinguished from fraud, would not vitiate a canvass. This is undisputed, well settled law.

None of these questions reach the material points upon which the decision must rest. Waiving all these, the important inquiries which strike at sacred rights are, was the certificate true? Was it either certain in result or had the inspectors power to render it certain? If not, is it, in law, of any value as testimony? It seems to me to call for but the exercise of the plainest common understanding to answer these questions. It was said in the Court of Appeals, in *People v. Cook* (8 N. Y., 86), that "the great object of the

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duty enjoined by law upon inspectors is first to afford every citizen having a constitutional right to vote an opportunity to exercise the right," and also "to conduct the election in such manner *that the true number of legal votes can be ascertained with certainty.*" But suppose, for a reason, without any fraudulent intent on the part of the inspectors, that *uncertainty* is produced as to the result, or as to the number of votes cast for a given candidate, such uncertainty as to destroy the *prima facie* evidence; what is the effect of the uncertainty of a canvass so given? If the common judgment of men did not respond that which is the legal answer, it is found already given by the highest judicial authority of the State. In *People v. Cook* (*supra*), in the Court of Appeals, they say: "Should a gang of rowdies gain possession of the ballot-box during or after the close of an election, *before the canvass, and destroy the whole or a portion of the ballots*, the whole should be rejected." Why? Because of the uncertainty of the result. Is the supposed case stated by the Court of Appeals more uncertain than the case at bar? If the uncertainty is beyond the power of correction or ascertainment, does it make any difference whether effected by a gang of rowdies or by the more quiet and secret movements of conspirators in darkness? And is this uncertainty sanctified or made better by a false certificate of the result? And should it be seriously urged to the court that such false certificate, based upon such uncertainty, is still legally effective; that it possesses life and moral vigor; that it remains and is sufficient evidence to maintain an action, or to sustain a defence, except to the extent that it is proved false in detail, though admitted to be false as a total?

If the whole should be rejected, where, then, is the *onus*?

If the uncertainty produced by a gang of rowdies with the ballot-box is cause of rejection of the whole for uncertainty, without reference to intentional fraud on the part of the inspectors, then, I think, the learned judge was in error in charging the jury as follows: "You are to examine and see whether *intentional* fraud was committed *by the inspectors*

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I can see nothing else than the *intentional* fraud of the inspectors which would justify you in entirely setting aside the canvass. It must be a conviction in your mind that there was *intentional* fraud upon the part of the inspectors, and such a fraud as altered the result, that is necessary in order to set aside the entire return." This portion of the charge, it is true, is in harmony with the whole theory upon which the trial proceeded, and with the views of the learned judge as to the law of this case; but I am not able to concur with this view. I regard the source from which the uncertainty proceeds as immaterial.

In this case, not irregularity only, but fraud, actual fraud, was committed by somebody upon the result of the exercise of the elective franchise; a fraud which rendered the actual result uncertain—incapable of being certified. This fraud was susceptible of proof; it was proved. The proof was not controverted. Votes were abstracted, which could only have been done by a fraud; and shall it be adopted as a rule of evidence that such a fraud can be sanctioned by courts and juries, because the perpetrator is not certainly proved to be the inspector? Must a citizen, by such a rule, lose his legal rights by fraud, because it is not proved to have been committed by particular individuals? Is the sacred right of the citizen, is truth to be sacrificed to mere form; substance to shadow? Is *prima facie* presumption to be held of superior weight in the scale to the highest evidence of positive truth? If certifying to a known untruth by the inspectors is not a fraud, such a certificate should not, at least, be held to be honest, and entitled to more respect in courts than truth itself.

I think such a rule should not be introduced into the law of evidence. It would be as much an anomaly in law as it is in morals. It would be a rule by which an individual could be defrauded of his most sacred rights by a fiction. It would be a rule tending to demoralize public sentiment, and encourage officers to corruption in the discharge of their public duties.

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I cannot concur in the views of the counsel of the defendant urged to us, that the official certificate of an inspector, after proof and even after the concession of its untruthfulness and consequent uncertainty, still possesses the legal effect of throwing the burden of proof upon the relator to such an extent as to compel him to prove an impossible negative. But if I am in error as to the rule of evidence, as to its effect, as to the change of the *onus probandi* during the trial, I think there was an error in the refusal of the learned judge to charge the jury, as requested by the plaintiff's counsel, as follows:

"If the jury believe from the evidence that, preceding or during the canvass of the mayor's box, ballots for mayor were either illegally abstracted from the box or table, or placed in the box or on the table, and it is entirely uncertain to what extent this was done, then the returns should be rejected, and each candidate credited only with the votes otherwise proved to have been cast for him, although none of the inspectors were concerned in the transaction."

There was certainly evidence in the case, not only tending to prove, but proving an abstraction of votes, as well as evidence tending to prove a change of ballots.

There were questions of fact for consideration of the jury. By higher and better evidence than the inspectors' return it was proved that at least two hundred electors voted for the relator. The inspectors certify they found but one hundred and thirteen votes, for him, to canvass. What then became of the eighty-seven votes not canvassed? So 134 electors testified they cast their ballots therein for McCarty. What became of the other fifty-five votes? Were they not abstracted? Why not allow the jury to pass upon this evidence? If these witnesses swore truly, votes had been abstracted. It added to the uncertainty of the return. This uncertainty was a question for the jury; it was a question affecting the credit, the verity of the return. So it also added to the evidence of its falsity. The inspectors certify that the defendant received four hundred and sixty votes.

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The oral proof establishes that three hundred and thirty-four votes were given for the relator and McCarty. This would make a total of 794 votes (sixty-two more than was given). The poll lists show that this number cannot be true. The inspectors certify that 652 were given; a variation from this of 152 votes.

I think this impeachment was a most proper question for the jury, and that it was error to exclude it. It is logically as well as physically certain, either that votes were abstracted that were given for the relator and McCarty, or that votes had been added that had not been counted by the electors for the defendant.

This result, this uncertainty, might have happened without intended fraud of the inspectors. So far as it produced that uncertainty, the fraudulent intent of the *inspectors* is not, as was assumed, the *only* material issue.

Without proceeding further in detail to review the exceptions taken to the charge, it seems to me that the whole theory of the charge was the erroneously giving undue weight, importance and conclusiveness to a certificate and return of inspectors, on a trial of this character, instituted for the ascertainment of truth. On a trial of the inspectors for misdemeanor, the theory adopted might be correct; but on the trial of right between two individuals, where a truthful result between them was the question, where the only object was to ascertain the true number of genuine ballots cast in the district, and the true number cast for each party to the issue, then the conduct of the inspectors, except so far as it was calculated to develop truth and establish certainty, is wholly unimportant. Their official certificate, which is really but hearsay, or the declaration of third persons, adopted by the common law as *prima facie* evidence, from public policy, from a presumption that public officers have done their duty, is, when impeached, falsified and rendered without force, vitality or effect in the establishment of truth.

The claimed power of an official, which is both uncertain and untrue, over better evidence, even over truth, is a doc

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trine that should never, in my opinion, find place in the jurisprudence of any civilized government. For these reasons, I concur in the result of the opinion of my brother PARKER, that a new trial should be granted. I refrain from the examination of a multitude of exceptions found in the case. If I am right, the errors pointed out require a new trial.

MILLER, P. J., dissenting. I am constrained to differ from my brother Parker in the conclusions at which he has arrived in this case.\* The grounds upon which he is of the opinion that the judge erred upon the trial relate to the charge of the judge and his refusal to charge as requested, and I shall therefore examine as briefly as the nature of the subject will admit the various propositions discussed in reference to this branch of the case.

The judge, after referring to the proof upon the trial as to the number of votes, and stating what they were proved to have been, in his charge to the jury, said: "Indeed, it is hardly claimed, I believe, upon either side, that 652 was the entire number of votes cast for mayor. It would hardly do to assume that the return is correct for this purpose and in this particular, and not accurate for other purposes and in other particulars. I do not see, therefore, that there is any propriety in taking 336 from 652, and assuming that only the remainder, or balance left, is to be allowed as representing the true number of votes cast for Mr. Thacher."

He then proceeded to make some remarks as to the number of votes cast for Judson and McCarty, and the whole number of votes, and said: "Deducting, therefore, the 336 from the 729, it leaves 393 votes which might have been given, and which, for aught that appears, were given for Mr. Thacher."

He subsequently, in the same connection, remarked: "Taking only those who read their ballots, and the vote is 176 for Judson and eighty-five for McCarty, making a total of 261. Deducting that number from 729, the total number cast in

\*The opinion of Justice POTTER was not given until after the dissenting opinion of MILLER, P. J., had been delivered.

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that district for mayor, as sworn to by Chapman, and as appears by the poll list, and there remains a balance of 468 votes *which might have been cast for Thacher*. You will notice that these two results come out the one a little over and the other a little under the number of votes returned by the inspectors as actually cast for Mr. Thacher (460). I have now given you my view in regard to the number of votes proved. I see no reason why you should deduct the number of votes proved to have been cast for Judson and McCarty from the *smaller* number of votes canvassed, and not from the larger number of votes cast at that poll. There is no dispute as to the number of votes canvassed. There were but 652 votes there at that canvass; all three of the inspectors counted them and made that number. But that a larger number of votes was actually voted at that poll for mayor *seems to be admitted by counsel upon both sides*. It seems to me, therefore, as I have said, that the deduction should be made from 729 and not from 652."

The counsel for the defendant excepted as follows, viz.: "to that part of the charge in which he said I do not understand that they are entitled to have the vote deducted from 652." Also to "that part of the charge in which he said you are to deduct the number from 729, and Thacher may have the balance." The judge did not make either of the remarks which the exceptions taken impute to him. As to the first exception, if it can be construed as covering what the judge actually said as to the propriety of deducting 336 from 652, I think it was not well taken, for it is plain and unmistakable that there would be no propriety in deducting the votes claimed to have been cast for Judson and McCarty from any other sum than the total number of votes cast for mayor, which the poll list showed and which was shown by all the inspectors, as I understand, and conceded by all parties to have been 729. Why, then, should the votes claimed for those candidates be deducted from the lesser number of votes, when the returns of the inspectors show that Thacher received even more than the difference between the votes claimed for Jud-

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son and McCarty and 729, the whole number of votes cast for mayor?

As to the second exception, it will be seen, by reference to the charge, that the judge did not say at any time, as is claimed in the exception, that after the deduction was made from 729 Thacher might have the balance. It was an error, therefore, to assume that any such language was employed; and the fair construction to be placed upon the remarks made is, that after deducting from the whole number of votes, 336, the difference might have been given, or, for aught which appeared, were given to Thacher. And after deducting those which were claimed to have been read, 261, the balance, 468, might have been given for Thacher, and, further, that it seemed to him that the deduction should be made from 729, not from 652.

I think that there can be no doubt that the judge was clearly right in saying that the deduction should be from the larger instead of the smaller number, and in the remarks that the 393 votes might have been given, or, for anything that appears, were given for Thacher. As the deduction stated was clearly proper, and the number remaining might have been or were cast for Thacher, there was no error in this respect. The position, therefore, that the judge assumed that the difference between the lesser and larger sums *were* given to Thacher, without regard to the canvass and certificate of the inspectors, is erroneous. Nor was it, in my opinion, in any way proper, even if such a charge had been actually made, to submit to the consideration of the jury the question whether the 393 votes were cast for Thacher, as it was plain what the fact was from the evidence introduced. The case did not turn upon any such disputed question, and the error of the counsel consists in overlooking how the proof actually stood. If the testimony showed, as is claimed, that Judson and McCarty had received 336 votes, they were only entitled to have that number counted for them. The return showed that Thacher had received 460, and must be taken as true, except so far as it is impeached or proved to be errone-



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ous, or unless there was fraud. Now, allowing the 336 votes to Judson and McCarty, it left from the whole number cast, which was 729, a remainder of 393 votes, which certainly was a portion of the 460 to which Thacher was entitled. The 460 votes returned for Thacher should only be reduced so far as was inconsistent with the evidence of witnesses, which had been introduced and sworn, provided that evidence was to be relied upon, for the purpose of showing the number of votes received by Judson and McCarty. In this respect the certificate should be considered as corrected; and, giving to Judson and McCarty the full benefit of the evidence, and assuming that all the votes, those which were read, as well as those which were not read, by the voters, were to be counted for them, there would be enough majority remaining to elect Thacher.

It must be borne in mind that the plaintiff held the affirmative of the issue, and was bound to make out a case. He must show affirmatively that the relator was elected, and what votes he actually received in opposition to the return of the inspectors. He was only entitled to the number of votes proved, and could not claim any beyond this. When the plaintiff proved that the relator and McCarty received a certain number of votes, it was only one step toward showing that he was elected, and it did not impose upon Thacher the burden of showing what votes he had received independent of the certificate. It only affected the return to the extent in which it proved that it was erroneous, and not beyond this. Thacher had a right to rely on the return, and, allowing to the plaintiff all which he claimed, was entitled to the remainder of the votes cast. There was no proof that either the plaintiff or McCarty had the remainder, as they only proved a lesser number, and the return gave more than the remainder to Thacher.

In any point of view in which the exceptions to the charge which have been discussed may be considered, I think that there was no error.

The exception taken to the charge of the judge, to the effect that "nothing authorized the jury to reject the returns other than the conviction in their minds that it was the

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result of intentional fraud upon the part of the inspectors," was not, I think, well founded. This precise language was not used by the judge; and the part excepted to must be considered in connection with what was previously said upon the subject. The judge stated that it was claimed that there was intentional fraud on the part of the inspectors; and if it was shown that such was the fact, that the jury were "at liberty to reject the return entirely on that account."

He then proceeded to discuss the question as to what constituted fraud, referred to the testimony as to what took place when the canvass was had, to the circumstance of the rejection of one ballot and putting another in the box when two had been given to the inspector, and to the refusal to admit persons into the room where the canvass was going on, and concluded his remarks on this subject as follows:

"It is for you to bear in mind that these are matters bearing upon the question of intention. They are not necessarily conclusive as to fraud in the case.

"The principal event in the history of this canvass, that attracts attention upon this question, was the going out of the light, and what took place at that time. I do not think I should detain you here to discuss that transaction in detail. I leave that for your consideration. You are to find whether fraud was committed. I do not speak of the misconduct of outside parties; but you are to examine and see whether intentional fraud was committed by the inspectors. I can see nothing else than the intentional fraud of the inspectors which would justify you in entirely setting aside the canvass.

"It must be a conviction in your minds that there was intentional fraud on the part of the inspectors, and such a fraud as altered the result, that is necessary in order to set aside the entire return."

The exception relates to the last portions of the charge quoted, if it is at all available, and these had special reference, as will be seen, to what occurred when the light was extinguished. It was not an independent proposition alone and of itself, but a remark made at the close, after the judge had

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commented on all the other portions of the case, and without any apparent intention to put the decision of the entire case upon any such ground solely. I think that the language employed in connection with the evidence was sound, and as favorable to the plaintiff as the facts warranted, for the evidence was quite strong that the inspectors had acted throughout in entire good faith. As public officers they were sworn to perform their duty. They were present during the few seconds which transpired when the room was in darkness, with their hands on the ballots, seeking to protect the same, and it is difficult to see how any change could have been made, or fraud have been committed, without their assent and connivance. The evidence did not prove that any person outside interfered with the ballots, or added or subtracted a single vote from the table. If it was done, the inspectors must have been participators in the fraud beyond any question, and the court went so far, upon being requested, as to charge that the jury had a right to find that fraud was proved, within the meaning of the law, when they found, from the evidence, the existence of circumstances from which fraud is a natural and probable inference.

The principle laid down in this portion of the charge excepted to was intrinsically right in the abstract, as the case stood; and in the absence of direct proof that fraud had been perpetrated by the introduction or abstraction of ballots, and in the face of the fact that the inspectors, acting under oath, had determined to the contrary, no other safe rule could have been adopted. If any circumstances did exist from which fraud might even be inferred, the jury were allowed, by the answer to one of the requests to charge as already stated, to take them into consideration. In view of all the facts and circumstances presented, I am of the opinion that the charge in this respect was clearly correct, and the true rule was laid down.

In connection with the exception last discussed, my brother Parker has considered the seventh request made by the plaintiff's counsel to charge the jury, which was refused by the judge, and to which refusal it is claimed an exception was

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People ex rel. Judson v. Thacher.

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taken. It is as follows: "If the jury believe from the evidence that, preceding or during the canvass of the mayor's box, ballots for mayor were either illegally abstracted from the box or table, or placed in the box or on the table, and it is entirely uncertain *to what extent this was done*, then the returns should be rejected, and each candidate credited only with the votes otherwise proved to have been cast for him, although none of the inspectors were concerned in the transaction."

It bears somewhat upon, and it is, perhaps, appropriate to examine it, therefore, as identified with the charge in regard to intentional fraud by the inspectors. It will be observed that it is broad and comprehensive, and required the judge to hold that if any number of ballots, however small, even more than a single ballot, had been illegally abstracted or placed in the box, so as to render it uncertain to what extent this was done, the return should be rejected and the parties be left to prove what votes they had received. No matter whether it changed the result or not; no matter whether it was sure beyond contingency who was the successful candidate, according to this rule the slightest variation or inaccuracy, which cast a doubt upon the subject, would authorize a rejection of the return. Nothing would be left to the honest judgment of the inspectors if this were the rule, and, in the confusion incident to such occasions, it would present opportunities for contests when there were no real grounds, thus transferring the canvass to the forum of the courts, from the place which the law designates. The court had already stated that fraud of the inspectors would justify the jury in disregarding the return, and I think this portion of the charge comprehended and covered any slight irregularity or error of the character indicated. If the evidence showed fraud of the inspectors, in the canvass, or by ignoring plain rules of law and integrity which should govern their action, then of course it should be vacated. And this very rule was embraced in the charge. But if the doctrine can be maintained, that the misconduct of outside parties, who, in the interest of one or

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People ex rel. Judson v. Thatcher.

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more of the candidates, are induced to commit a fraud, without the knowledge or acquiescence of the inspectors, which in no way alters the result, can vitiate and destroy a return of a canvass, it would inevitably lead to the grossest of abuses. While mistakes should be corrected and the return varied as the judge did charge, when there is no evidence of fraud by the inspectors nor any testimony showing that ballots had been changed or interpolated, no good legal reason exists for setting aside the return. It is an entire mistake to assume that this request to charge embraced a case where the proof showed that ballots had been taken away and others put in their places, so that the result of the voting was rendered uncertain. No such proposition was embraced in the request made, and no such state of facts was presented. If such had been the intention of the counsel, he should have so expressed himself. As he did not, we cannot enlarge the character or effect of the language employed in the request, nor are we at liberty now to determine any proposition in that form.

It should be a strong and clear case of fraud, which otherwise could not be corrected, which would authorize the rejection of a return entirely. The inspectors were not vested with any such power; but when a fraud has been perpetrated, the ballots or a portion of them destroyed, or others introduced surreptitiously into the box, so as to render it impossible to ascertain the number of genuine ballots, it is their duty to certify and declare the fact. (*People v. Cook*, 4 Seld., 93.) If they omit to do this, and to certify as to the real state of the canvass, they would perpetrate a fraud, and the charge expressly provided against any such act. It is manifest, I think, that the request to charge was clearly erroneous, and properly refused.

The foregoing remarks cover the grounds taken in the opinion of the learned judge in favor of a new trial. The other requests to charge, I think, are mainly covered by the charge as made; and none of them, in my opinion, are well founded. Although I have examined the various requests made and the refusal to charge as if duly excepted to, it is

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exceedingly doubtful whether valid exceptions were taken to any of them within the rules laid down in 40 N. Y., 550; 45 id., 129, 137, as it appears that the attention of the court was not called to each one of them separately after they had been handed to the court.

A number of other questions are raised by the learned counsel for the plaintiff, as to the rulings of the judge upon the trial, but I am unable to discover any error in any of the decisions made in regard to them. While it would be more satisfactory to discuss them at length, the limited time intervening before the commencement of another term prevents the performance of such a task. Suffice it, therefore, to say, that after a careful investigation and full consideration of the various points raised, I am satisfied that the case was well tried at the circuit, that no errors were committed by the judge; that a new trial must be denied, and the judgment and order affirmed, with costs.

Judgment and order reversed.

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THE PEOPLE OF THE STATE OF NEW YORK *v.* DISPENSARY  
AND HOSPITAL SOCIETY OF THE WOMEN'S INSTITUTE OF THE  
CITY OF NEW YORK.

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1873.)

An agreement made by one of the trustees of a corporation that if A. will obtain an appropriation for it from the legislature he shall receive whatever amount may be appropriated in excess of a certain sum, was subsequently ratified by the board of trustees, who were cognizant of the agreement, by the appropriation of the excess over the sum named to the payment of A., after he had obtained the legislative appropriation and the payment of the moneys to A. pursuant to the resolution,—*Held*, that these acts were such an abuse of the powers of the corporation as to constitute sufficient cause for its dissolution.

An answer to a complaint asking such relief and alleging the above facts, which does not deny them, but sets up merely that the trustees acted upon the advice of their counsel in making the payment, and that the board of trustees has been changed since the passage of the resolution by the election of new members, and that the present board is competent to manage the affairs of the corporation, is frivolous.

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MOTION for judgment upon answer as frivolous. The action was brought for dissolution of the defendants as a corporation.

The facts are stated in the following opinion, delivered by DANFORTH, J., at Special Term.

*Marcus T. Hun*, deputy attorney-general, for the People.

*Matthew Hale*, for the defendant.

DANFORTH, J. The defendant is incorporated under an act of the legislature of the State of New York, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies, passed April 12th, 1848, and the acts amendatory thereof."

The particular business and object of the association, as claimed in the charter, are to ameliorate the sufferings of invalid women, by furnishing gratuitous treatment and advice to out-door patients, and by providing skillful medical and surgical treatment in the hospital, which shall include every appliance and remedial agent that promises to promote and hasten recovery; and upon such conditions as will render the benefits available to those for whom they are designed, regardless of the nationality or religious opinions of the applicant, and to train and educate respectable intelligent women, theoretically and practically, in all that pertains to the duties of a professional nurse.

Under an act passed April 28th, 1871, making appropriations to certain public and charitable institutions, the defendant received \$7,500 from the State. The defendant was bound to properly and rightfully use said sum in the business and in the furtherance of the objects of said corporation.

The complaint alleges, among other things, that on or about the 2d of May, 1871, defendant passed and duly adopted the following resolution: "*Resolved*, That \$2,500 be and the same is hereby appropriated to pay one Charles Thompson for services rendered the society, and the treasurer is hereby directed and empowered to pay the same from any

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funds in her possession which belong to the Dispensary and Hospital Society." That under said resolution \$2,500, being a part of the \$7,500 appropriated by the State, was paid the person referred to by the resolution, and that said person rendered no service to said society, except to assist in inducing the legislature to grant the appropriation, and did this with the collusive and corrupt agreement with Leonora Jones, one of the trustees, that the said Thompson should be paid by defendant whatever sum should be appropriated in excess of the sum of \$5,000; and that said sum of \$2,500 was paid said Thompson under said resolution, which was passed by the trustees in confirmation of the acts of said Leonora Jones and said Thompson, which were well known to each and every one of the trustees at the time.

The complaint charges acts of extravagance in the purchase of expensive furniture, &c. The answer admits the receipt of the \$7,500, and upon the conditions named in the complaint. It denies that any portion of it was squandered or wasted, or unlawfully expended. It alleges that the \$2,500 was paid to Thompson for services actually rendered to defendant and in pursuance of advice of counsel that Thompson was legally entitled to the same.

It admits the agreement named in complaint was carried out and ratified by these trustees, and that the payment was made under said resolution. It denies the allegations of extravagance in purchasing expensive furniture, and denies • the allegations not therein before admitted.

It also sets up that at a late election only three of the old trustees were elected, and that the present board are wholly competent to manage and attend to the affairs of the corporation.

The corporation was legally formed. Franchises may be forfeited by breach of the trust on which they were granted and perversion of the objects of the grant. The execution of the trust is a condition of the grant. Section 430 of the Code authorizes the bringing of an action to vacate the charter of a corporation in certain cases. The statute creating



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the defendant defined the powers, duties and objects of the corporation. It contemplated a most praiseworthy charity. The people, by the act of appropriation of \$7,500 to the society, gave the money to be faithfully and judiciously expended in the furtherance of the objects expressed in the charter. The complaint charges an intent to injure and defraud the people in the making of the agreement with Thompson, and alleges full knowledge of it by the trustees at the time of their ratification of it. The intent is not denied, and is charged as pervading the agreement and the acts under it.

Now, whether the contract with Thompson made between him and Leonora Jones, and ratified by the trustees, was void or not, as tainted with lobbying, I cannot decide, because the pleadings show only that he was to assist in inducing the legislature to make an appropriation, which expression or agreement may cover a legal or illegal consideration (see *Brown v. Brown*, 34 Barbour, 533), depending upon the nature of the influence used; but I think the bare making of the agreement with Thompson, the deliberate ratification of it by the board of trustees and the payment under it, with an admitted knowledge of its corrupt design, were an abuse of the power of the corporation.

To agree that for influencing the legislature (in any way) to appropriate a sum (which might be very large) Thompson could have the excess of that amount over \$5,000 was a reckless disregard of the true interests of the corporation; and the fulfillment of the agreement as above stated was, in my opinion, an unwarranted use of the money—a perversion of the objects of the grant. There is no averment that the services of Thompson were worth that sum, or that in fact he performed any legal services, such as appearing before a committee of the assembly or senate, only that the \$2,500 was paid under the advice of the then counsel of the board, that Thompson was entitled to it. The answer contains no denial or justification of the said agreement, which is alleged to have been made with intent and design to defraud the

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people. The denials of the answer go to portions of the complaint not necessary to prove to sustain the action. The allegation that only three of the old trustees were re-elected, and that the present trustees are competent to manage defendant's affairs, is clearly frivolous, and seems to imply a confession that the acts of the former trustees were censurable at least.

Every year the people of the State, with a generosity and policy that becomes a great and enlightened commonwealth, grant large sums of money to various institutions which were founded to elevate the degraded, to care for the sick and unfortunate, to lift burdens from thousands, in short, to benefit the whole State by making individual citizens better, stronger and happier. And the State has a right to require of the trustees of its bounty an expenditure of the moneys in strict accordance with the expressed object and aim of the institution. It will brook no diversion of the funds, nor tolerate any bargains by which any portion of the trust moneys may be lightly treated or improvidently used. By the act in which the \$7,500 were intrusted to the defendant, the legislature appropriated about \$1,000,000 to various institutions to ameliorate the condition of the unfortunate in every part of the State. Suppose for a moment that one-third of this amount had been diverted from the proper and intended channels, and had been paid to influence the legislature in their acts, how long would the people consent to sustain our noble charities?

I think it plain that these trustees have shown themselves unworthy of the trust, have abused their powers and forfeited their charter.

The motion is granted.

An appeal was taken to the General Term, and at the term above mentioned (present, MILLER, P. J., POTTER and DANIELS, JJ.) the order and judgment at Special Term affirmed.

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Folsom v. Van Wagner.

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## ALEXANDER FOLSOM v. JOHN VAN WAGNER.

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1873.)

In a difficult and extraordinary case, after issue and before trial, it having been twice on the calendar and prepared by defendant for trial, an order was entered, on motion of plaintiff, discontinuing, "on payment of defendant's costs to be taxed, and of an extra allowance herein which may hereafter be made or granted to defendant."

*Held*, that defendant was entitled to judgment and an extra allowance, in addition to taxable costs, under section 309 of the Code.

*Held*, also, that there was a "recovery of judgment" by defendant, within the meaning of section 303 of the Code.

It seems a recovery of judgment is not necessarily a condition precedent to allowance of costs.

THE following opinion was rendered by DANFORTH J., at Albany Special Term, in which the facts are stated.

*Israel Lawson*, for the plaintiff.

*Monell & Van Wyck & R. E. Andrews*, for the defendant.

DANFORTH, J. This action was brought to compel specific performance of an alleged agreement for the sale of land in Columbia county of the value of \$12,000.

The cause proceeded to issue and was twice on the calendar at the Columbia Circuit, and the defendant was ready for trial.

On motion of the plaintiff at a Special Term the following order was made: "It is ordered that this action be discontinued on payment by plaintiff to the defendant or his attorney, on demand, of the defendant's costs herein to be taxed, and of any extra allowance herein which may hereafter be made or granted to the defendant herein; the same, if made, to be taxed, and included in said bill of costs. This order in nowise to prejudice the defendant's right to move for such extra allowance; and such costs not to be deemed payable until the defendant shall have had a reasonable time to make and have determined a motion for such extra allowance."

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The defendant now moves for an extra allowance under section 309 of the Code. It is conceded that the case is difficult and extraordinary.

The plaintiff insists that no extra allowance can be made, no judgment having been entered, and that section 303 of the Code so far qualifies section 309 that no allowance nor costs can be given, except "to the prevailing party upon the judgment;" and that, under the order in this case, if the costs should not be paid in pursuance to it, the defendant is not entitled to judgment, but must treat the order as a nullity and may proceed with the cause. I think the plaintiff's position is untenable. He virtually admits, by entering the order, that he cannot maintain his case. Under it the defendant is entitled to judgment and taxable costs, and a further allowance may be made to him.

The only question is whether it may be made before judgment or not. I think it may.

The order expressly states that the costs (meaning taxable costs) are not to be deemed payable until the determination of a motion by defendant for extra allowance.

The plaintiff obtained the order, and it amounts to a stipulation that defendant may move before judgment for an extra allowance.

The provision in section 303 of the Code, that there may be allowed to the prevailing party upon the judgment, &c., means, I think, not that the recovery of judgment is a condition precedent of the allowance of costs, but that costs may be allowed to the prevailing party, "to be included in the judgment."

In section 308 it is provided that certain additional sums shall be allowed to the plaintiff upon the recovery of judgment by him, &c.

This phrase is entirely different from "upon the judgment," and makes the "recovery of judgment" a condition of the allowances, except the provision for half rates in the last of the section.

In this case the defendant has prevailed. The plaintiff is

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CROLIUS v. Stark.

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estopped by his order from insisting that he has not. Defendant is entitled to judgment. (7 Abb. Pr. [N. S.], 41; 1 Burrel on Pr., 179.)

If plaintiff's interpretation of the order were correct, a plaintiff desiring to put a cause over a circuit would have only to enter an order *ex parte*, to discontinue and offer to pay costs; and then, after the circuit and on presentation by defendant of the taxed costs, decline to pay.

The defendant's only course of further procedure, according to this theory, would be to notice for another circuit.

The taxable costs in this case will, by no means, compensate the defendant for drafting the answer and preparing for trial.

I think it is a case in which an extra allowance should be made. Motion granted for \$250 extra allowance to the defendant.

From the order entered pursuant to the decision plaintiff appealed, and at General Term, March, 1873 (present, MILLER, P. J., POTTER and DANIELS, JJ.), the order was unanimously affirmed.

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JOHN CROLIUS, Appellant, v. SARAH STARK and others,  
Respondents.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1873.)

A surrogate's decision, rejecting a testamentary paper for mental incapacity, based upon the decided opinion of an attending physician whose visits were infrequent, and formed from the condition of, and not from conversations with, the deceased, against the testimony of a physician speaking not from interview, but from statement of the case, and of lay witnesses whose intercourse had been frequent, who had conversed with and seen the testatrix transact business, and who were witnesses to the paper, though conflicting and colored by evident bias,—*Held*, not to be conclusive, and a feigned issue awarded on appeal.

Entire loss of intellect producing in the decedent inability to understand what he is doing or the contents of the paper when read, are necessary to warrant its rejection on the ground of incapacity.

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Crollius v. Stark.

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APPEAL from a decree of the surrogate of New York, admitting to probate the will and first codicil of Sarah Gray, deceased, and rejecting the second codicil. The facts relating to the question discussed sufficiently appear in the opinion.

*Henry Whittaker*, for the appellant.

*H. A. Nelson*, for the respondent, Sarah Stark.

Present—INGRAHAM, P. J., and BRADY, J.

INGRAHAM, P. J. The appeal in this case is from the decree of the surrogate, admitting to probate the will and first codicil of Sarah Gray and rejecting the second codicil. The objection made to the second codicil was on the ground of mental incapacity and of fraud and undue influence. The surrogate was of the opinion that the will and the first codicil were executed by the testatrix in due form of law, and at a time when there was no doubt as to her capacity to make a will, and his decision was based entirely as to the codicil on the supposed invalidity of the second codicil by which the first was revoked, and of the cancellation of it which took place at the time of executing the last.

The grounds on which his decision rested are as follows, viz.: that the testimony of the lay witnesses was conflicting, and they were interested in the result. Those on one side testified to many acts which he thought indicated a sufficient mental capacity, while those on the other side show a state of facts which strongly denoted a contrary mental condition.

The surrogate then says: "Under such circumstances, I must resort to the testimony of professional witnesses to influence and guide me in determining the question of capacity." He then refers to the testimony of the two physicians who were examined before him, Drs. Clark and Quackenboss, and adopts the testimony of the latter as controlling, because he had been her attending physician, and, in his opinion, testatrix

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was incapable of properly exercising her judgment in regard to making a will. Under this evidence he rejected the second codicil.

In regard to the evidence of the lay witnesses, there can be no doubt that there was much contradiction on the part of the witnesses, and in many cases a coloring was given to their testimony which clearly shows the bias in the minds, whether produced by feeling or interest.

If this case rested solely on that evidence, we should hesitate about interfering with the decision, knowing that the surrogate had the witnesses before him, and had a better opportunity of deciding as to the credit they were entitled to than we have on an appeal. As, however, he appears to have been controlled in his decision by the testimony of the physician who attended her, other matters must be considered on this appeal.

The testimony of both witnesses to the last codicil, one of whom had been witness to the first also, was unqualifiedly in favor of the mental capacity of the testatrix. Dr. Clark's testimony was in favor of her capacity, although he spoke from a statement of her case, and not from having visited the deceased.

The testimony of her physician is decided against her competency to make a will. He speaks of her intellect being enfeebled, and her inability to comprehend the claims on her bounty and the provisions of the codicil.

The second attack appears to have been a paralysis of the muscles of the throat, and the power of speech and some failure of memory was caused by it. He stated his opinion was formed from her condition and not from conversations with her. Nor is it clear that he had many opportunities of forming such opinions after 13th February. Subsequent to that day his interviews with her were not more than one a month, if as often. These opportunities of judging of mental capacity do not seem to be sufficient to warrant the rejection of the testimony of all those who were about the testatrix daily, whose intercourse was frequent, who had conversations

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with her on many occasions, who saw business transacted by her, or who were the witnesses to the codicil which has been rejected.

These matters referred to, as well as many others which appear in the testimony, lead us to entertain doubt, as to the questions argued, in regard to the last codicil.

It does not follow that either age or weakness of intellect is sufficient to incapacitate a person from making a will. It must be an entire loss of intellect, so that the testatrix was unable to understand what she was doing, or the contents of the paper when read to her; we do not think the evidence in this case warrants this conclusion. She may have been, and doubtless was, weakened both in body and mind by her second attack, but not to an extent sufficient to destroy her capacity to dispose of her property. We think this is one of those cases in which it is proper to take the finding of a jury upon the questions raised. While we would not, without further examination, order the second codicil to probate, we think the decision of the court below should not be sustained, withal the questions should be sent down to the circuit for trial.

Decree of the surrogate reversed and feigned issue awarded, costs to abide event.

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LEWIS J. PHILLIPS, Respondent, v. ALVIN HIGGINS, Appellant.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1878.)

A map prepared by defendant and produced at an auction sale of lots in New York city, of which he was the owner, represented a strip of land as One Hundred and Thirty-fifth street, and the auctioneer sold lots as laid out on the strip, and a boulevard shown by the map, which crossed it, stating that they were corner lots. *Held*, that plaintiff, who purchased the lots at the sale, and who before bidding had seen the map, was entitled to all which he might properly have understood from the map and auctioneer's language, viz., to a conveyance describing the lots as being bounded by One Hundred and Thirty-fifth street, and that a conveyance stating that they were bounded by "the line of a certain strip of land designated and laid out as One Hundred and Thirty-fifth street on the



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map or plan of the city of New York" was not in compliance with the contract of sale.

*Held*, also, that evidence offered by defendant in an action for specific performance to prove what he intended to sell was properly rejected.

THE facts are sufficiently stated in the opinion.

*S. F. & F. H. Cowdrey*, for the appellant.

*A. L. Sanger and Andrew Boardman*, for the respondent.

Present—BRADY and LEARNED, JJ.

LEARNED, J. This is an appeal from a judgment granted by Mr. Justice INGRAHAM.

The action is to compel specific performance of a sale of land.

Certain lots were sold at auction, and the point in dispute is substantially whether the conveyance thereof should describe them as bounded on a street.

A map prepared by defendant was produced at the auction sale. By this it appears that all of the three disputed lots are bounded on the Boulevard. One Hundred and Thirty-fifth street on the map appears to cross the Boulevard, and lot sixty-three is at the south-east corner of the Boulevard and that street. One Hundred and Thirty-fourth street on the map also appears to cross the Boulevard, except that a dotted line was across that street on the east line of the Boulevard. Lots seventy and seventy-one are respectively on the north-east and south-east corners of the Boulevard and that street.

The plaintiff attended the sale and had one of the maps before bidding.

There was evidence that the auctioneer, before putting up these three lots, described them to the persons present, including the plaintiff, as corner lots, and the justice who tried the case has found this fact.

The defendant tendered a deed describing lot sixty-three as bounded northerly by the southerly line of a certain strip of land designated and laid out as 135th street on the map or plan of the city of New York and similarly as to the other lot.

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*Phillips v. Higgins.*

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The judgment directs that lot sixty-three be described as bounded northwardly by the strip of land laid out and designated on the said map as 135th street, as designated on the said annexed map or plan.

One exception taken by the defendant is that he was not permitted to prove what he intended to sell.

Such evidence would have clearly been inadmissible.

The rights of the parties depend on what took place at the sale; not on the intentions of the defendant, which were not communicated to the plaintiff.

The only other question is on the judgment requiring the defendant to describe the property conveyed in the manner above stated. Now, this judgment exactly follows the bargain as shown by the evidence.

A strip of land was designated on the map produced at the sale as 135th street, and, notwithstanding the dotted line, it is plain that another strip on the east as well as on the west line of the Boulevard was designated as 134th street.

Taken in connection with this abundant proof that the three lots, sixty, seventy and seventy-one, were described as corner lots, and there can be no doubt that these lots, as they were sold, were respectively bounded on this side by a strip of land, designated on the defendant's map as a street.

Furthermore, if the defendant had intended that purchasers should understand that they were not, in these three instances, buying corner lots, he could easily have made that perfectly understood. If, by this map and by the statements of his auctioneer, the purchasers were justified in believing that these were corner lots, he must carry out the sale in the manner in which they were thus justified in understanding it.

It is a familiar principle that the words of a contract must be taken most strongly against him who uses them.

The same principle applied here should hold this defendant strictly to all which the purchaser might properly understand from the map or the auctioneer's language.

Judgment should be affirmed, with costs.

BRADY, J., concurred. Judgment affirmed.

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Smith v. American Coal Co. of Alleghany County.

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ELISHA F. SMITH, Respondent, v. THE AMERICAN COAL COMPANY OF ALLEGHANY COUNTY, impleaded, &c., Appellant.

(GENERAL TERM, FIRST DEPARTMENT, 1873.)

The delivery of a stock certificate, as collateral security for an indebtedness, with the usual power of attorney indorsed thereon, signed by the owner, in blank, transfers all the owner's title, both legal and equitable, subject only to liens or claims of the corporation; and after such delivery the holder of the certificate and power may alone cause a transfer on the books of the company.

A sale of the original owner's interest in the stock, made after such delivery, under an attachment issued in an action against him, passes no title to the purchaser; and the company having transferred the stock upon their books to such purchaser, without surrender of the certificate, are liable to the real owner thereof.

And this is so, although the by-laws of the company provide that "no transfer of stock shall be valid unless made upon the books of the company by the person owning the stock or his attorney."

But the company, having no notice of transfer of the certificate, are protected in payment of dividends to the original owner, and in admitting him to vote on the stock, until transfer on its books.

THIS is an appeal from a judgment, entered on the report of a referee.

The defendant, the American Coal Company, is a corporation under the laws of Maryland, having its principal office in the city of New York.

On the 4th April, 1856, the company issued to Hill Gowdy a certificate (No. 134) for 100 shares of its capital stock, being of the par of \$25, and the same was so entered on its books.

On the 30th August, 1859, Gowdy, at the city of New York, signed a blank power of attorney on the back of said certificate and delivered it to C. S. Martin, of New York (together with other securities), as collateral security for an indebtedness then and theretofore due from said Gowdy to said Martin.

The power of attorney was not filled up, but remained in

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blank until about the time it was presented to the company, in 1864.

On the 9th January, 1864, this certificate, No. 134, with the blanks in the power of attorney on the back, dated November 20, 1861, was, for the first time, presented at the company's office, by a Mr. Gregory, a broker, and he asked the company "if it was all right," to which the secretary of the company replied: "No, that stock has been attached by the sheriff and sold, and transferred by order of the Supreme Court, and the certificate you present is worthless." Kane, a witness, testified that the plaintiff gave him the certificate of stock to sell, and he gave it to Gregory.

When presented by Gregory, it was the first time the certificate had, since its issue, been seen by the company or its officers, or presented at its office, or any demand made, or any notice given of its transfer, or of the power of attorney.

The reply so made to Mr. Gregory by the secretary was true.

On the 28th September, 1863, an attachment in the action of Moses B. Bramhall against said Hill Gowdy was issued out of this court in due form, and the sheriff of New York had thereunder attached this stock represented by said certificate No 134 and then standing to him on the books of the company.

Said action proceeded in due form to judgment and execution, the judgment having been docketed December 15, 1863, when execution issued, and the sheriff, by virtue thereof, sold the said stock, so attached in said action, on the 26th December, 1863; and the same was purchased at the sheriff's sale by Henry L. Gilbert, and was transferred to him by the sheriff on the books of the company.

At the time of the attachment of the stock, and also at the time of its sale on the execution, and its transfer thereunder to Gilbert, it stood on the books of the company in the name of Hill Gowdy, no transfer having been made on the books of the company to any one, and no application for a transfer having been made to the company, and no notice was ever given

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to the company that any such power of attorney had been given by Gowdy.

In 1860, Martin failed. His property was assigned, and this certificate of stock was "put in," as a witness expressed it, "with the assignment to the plaintiff."

The referee held as matter of law :

That the right and title to said stock passed from said Gowdy to said Martin on or about the thirtieth day of August, 1859, at the time of the transfer and delivery to said Martin of the certificate thereof, and the assignment and power of attorney, as above stated.

That the right and title to said stocks passed from said Martin to the plaintiff herein at the time of the transfer and delivery of said certificate, and of the assignment and power of attorney to him, in or about the year 1860, and he became owner of the same at that time.

That plaintiff is entitled to recover from the defendant, the American Coal Company of Alleghany county, the value of said stock in said month of March, 1864, \$2,750, and interest on that sum from the last day of March, 1864, which, at the date of his report, amounted in the whole to \$4,295.27.

Judgment was entered upon the report, and the American Coal Company appealed to the General Term.

*L. R. Marsh*, for the appellant.

*Edward Fitch*, for the respondent.

Present—INGRAHAM, P. J., and FANCHER, J.

FANCHER, J. When Gowdy, the owner of the stock, on the 30th August, 1859, signed the power of attorney, and delivered the certificate, with the power indorsed, to his creditor Martin, he transferred all his title, legal and equitable, to the stock, and, by virtue of the power and of the transfer contained in the same instrument, the holder of the certificate and power alone had authority thereafter to cause a transfer to be made on the books of the corporation. As Gowdy had

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thus parted with all his interest in the stock, he had no interest in it which could be the subject of attachment, after he parted with it. The attachment issued at the suit of Bramhall, on the 28th September, 1863, was ineffectual to reach the stock or any interest in it, and the sale by the sheriff of the assumed interest and title of Gowdy in the stock amounted to nothing. There was no interest or title of Gowdy in or to the stock which could be the subject of the attachment or the sale made by the sheriff, and the transfer by the sheriff conveyed no interest in or title to the stock to the purchaser.

In *McNeil v. Tenth National Bank* (46 N. Y., 331), RAPALLO, J., in delivering the opinion of the court, said: "It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificate, with the assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc."

By section 234 of the Code it is provided that the rights or shares which a defendant may have in the stock of any corporation shall be liable to be attached and levied upon and sold to satisfy the judgment and execution. But this provision of law cannot aid an attachment against a defendant who has no rights or shares in the stock of a corporation. If, previous to the issuing of the attachment, the defendant has assigned all his interest in the rights or shares, and delivered over the certificate with transfer and power, it is thenceforth the holder of these *indicia* of title who is possessed of the property in the shares, and not the original stockholder.

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It is claimed by the defendant that by a provision in the by-laws of the corporation "no transfer of stock shall be valid unless made upon the books of the company by the person owning the stock or his attorney," and that because of that provision no title could pass to the stock unless the transfer was thus made on the books of the company. The doctrine of the Court of Appeals is, that the provision referred to is intended solely for the protection of the corporation, and does not incapacitate the shareholder from parting with his interest, and that his transfer, though not on the books of the company, passes the entire legal title to the stock, subject to any liens or claims of the corporation. Until the transfer be made on the books of the corporation it would be protected in the payment of dividends to the original stockholder, assuming that no notice of his transfer had been given, and the corporation would also be protected in admitting the original stockholder who appeared as owner on the books to vote at elections. But if an act were suffered by the corporation that invested a third party with the ownership of the shares, without the production and surrender of the original certificate, it would be justly and properly liable to the real owner of the certificate. It is the duty and right of the corporation to resist a transfer of stock on its books without the production and surrender of the outstanding certificate representing the stock. The corporation would be protected in such resistance unless it be shown that the certificate has been lost or destroyed, and proof is made that the real owner of it has applied for a new certificate.

When, therefore, the plaintiff, as the owner and holder of the certificate in question, applied to the defendant for a transfer of the shares, and produced the certificate, with the power of the original stockholder, he was entitled to have the transfer made. The refusal of the corporation gave him a right of action for his damages. (*Com. Bank of Buffalo v. Kortright*, 22 Wend., 348.)

We think the judgment should be affirmed.

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Clark v. New York Life Insurance and Trust Co.

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HORACE F. CLARK, Appellant, v. THE NEW YORK LIFE INSURANCE AND TRUST COMPANY, Trustee, &c., and others, Respondents.

(GENERAL TERM, FIRST DEPARTMENT, JUNE, 1878.)

The purpose of a written agreement is to record, with precision, the mutual understanding of the parties. When the terms of it are free from ambiguity, everything *dehors* the writing is excluded, and all matters of negotiation and discussion on the subject are merged in the instrument.

Unless there be such an ambiguity in the terms of the contract as to require extrinsic evidence to remove or explain it, such evidence is inadmissible, or, if admitted, does not control the construction of the agreement,

Accordingly, where an agreement recited that the contracting parties were, respectively, owners of lots on the northerly and southerly sides of Twenty-second street, between Fourth avenue and Broadway, and made certain agreements respecting "the lots *fronting* said street,"—*Held*, the plain intent of the parties was to include in the agreement all their property on Twenty-second street, between Broadway and Fourth avenue; and that a map shown to have been before the parties at the execution of the agreement, upon which certain of the lots lying on the corner of Broadway and Fourth avenue were laid down as *fronting* on Broadway, could not control or interfere with this intention.

THE action was brought to obtain an injunction restraining the defendants from building to the street line on the southeast corner of Broadway and Twenty-second street, in the city of New York.

The appeal was taken by the plaintiff from that portion of the decree which denied the relief as to certain of the premises. The facts appear in the opinion.

*W. A. Beach*, for the appellant

*Joseph J. Marrin*, and *Wm. Henry Arnoux*, for the respondents.

Present—FANCHER and DAVIS, JJ.

FANCHER, J. On the 12th day of May, 1849, Philip Kearney was the owner of the premises on the northerly side of



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Twenty-second street, between Broadway and the Fourth avenue, in the city of New York; and Alexander S. Macomb and wife were the owners of the premises on the southerly side of that street, between Broadway and the Fourth avenue. Being such owners they, on said day, entered into a mutual agreement, under their hands and seals, a copy of which is annexed to the complaint, and upon the construction of which the rights of the parties to this action depend. The agreement was duly acknowledged and recorded, and contains covenants running with the land.

At the time of the agreement several dwelling-houses had been erected on either side of the street, which had been set back seven feet and six inches from the line of the street; thus leaving a space of that extent between the houses and the street. The agreement recites the fact of the ownership of the lots, as already mentioned, the fact of the erection of said houses, and that the parties thereto deemed it to be for their mutual advantage that the lots fronting said street when built upon, between the said Fourth avenue and Broadway, should be occupied exclusively by dwelling-houses; and that the fronts of all such dwelling-houses should be placed back seven feet and six inches from the line of the street, so as to range with those already built, and that no nuisance should be permitted on said lots between the Fourth avenue and Broadway. The parties then, by said agreement, did, for themselves and their respective heirs and assigns, grant and agree to and with each other that so much of their said respective lots as is contained between the line of the street and a line seven feet and six inches therefrom, should forever thereafter remain and be enjoyed as a court-yard in front of any houses to be erected on said lots; and that the parties should not, nor should their heirs or assigns, erect or permit to be erected or carried on, upon any part of the respective lots, any of the nuisances particularly specified in the agreement.

It is contended by the plaintiff, who owns one of the lots on the southerly side of the street, about 121 feet easterly

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from Broadway, that the covenant respects the entire strip of land seven and a half feet wide, extending from Broadway to the Fourth avenue; and the defendants contend that the covenant does not respect so much of said strip of land as does not now lie in front of the lots on Twenty-second street; and, therefore, that the portion of said strip which is part of the lot on Broadway is not affected by the agreement.

The learned judge before whom the action was tried at Special Term decided that the contract did not apply to the lot fronting on Broadway. He said: "Had not the original agreement been confined in its terms to lots fronting on Twenty-second street it might well be claimed that the intent of the parties was to extend the line as reserved thereby to Broadway; but as the terms are express, and exclude all lots but those fronting on the street, I do not see any ground upon which the corner lot can be included within its provisions."

This reasoning of the learned judge is forcible, if it be not founded upon a mistake of fact. He assumes that at the time the agreement was made there was a division of the premises, so that there were lots on the street and a corner lot fronting on Broadway. Indeed, the learned judge says: "It cannot be claimed that the intent of the parties was that no buildings should be erected on this land fronting on Broadway *unless it could be shown that the lots in question were laid out as fronting on that street*. No proof of such a character has been given. On the contrary, the premises at the time were occupied with old buildings having their front on Broadway, and have so remained. The lots were so laid out, and were so described on the map before referred to, and in the lease executed in 1854. The lot on the corner cannot be brought under the terms of this agreement except by altering the division of the lots to the destruction of the buildings ther existing thereon."

Surely, the learned judge fell into a serious error as to a matter of fact. When the agreement which has been referred to was executed there was no division of the land so that

there was a corner fronting on Broadway any more than it fronted on Twenty-second street, and there was then no building there. There was only a vacant plot of ground. It fronted both on Broadway and on Twenty-second street, about as much on one as the other. The agreement was made in May, 1849. And it was proved on the trial that when the plaintiff purchased his lot fronting on Twenty-second street, in 1852, the whole of the ground westerly from his house, and between it and Broadway, "was a lawn inclosed by a picket fence, and not subdivided. It was inclosed southerly by the middle of the block or by Twenty-first street. There was no house or building between the plaintiff's house and Broadway, then called Bloomingdale road. The whole space was inclosed in a picket railing, and in a lawn or very handsome grass plat." No buildings were erected on Broadway, on that ground, until 1854. One of the parties to the agreement, Alexander S. Macomb, was examined as a witness on the trial. He was asked, "Q. How did the land stand at that time? A. There was a straight line running from Broadway to Fourth avenue; we made an agreement to set back the line fronting on Twenty-second street seven feet and a half;" "the lots were not inclosed; we made the street ourselves, cut the street through, built the sewers, and laid out the street, and after laying out that street we made an agreement." "Q. How was the corner lot occupied at that time; was it inclosed, and if so, how? A. When the street was cut through, and about the time we made the agreement, I am not sure whether it was inclosed or not; I can't tell; I think it was a high bank, and we dug it down;" "if it was inclosed, the fence covered the whole lot; it covered the whole of the lot on Broadway 102 feet, and about 100 feet on Twenty-second street up to the line of the street."

This testimony makes it clear that at the time of the agreement there was no building on the land westerly from the plaintiff's house and lot, and that the premises bounded on one side by Broadway and on another side by Twenty-second

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street were not divided by any visible lines, but constituted one plat, nearly square, of vacant ground.

Whether the agreement was made with reference to any map of the *locus in quo*, except a map showing straight lines from Broadway to Fourth avenue, is not very clear. Maccomb, one of the parties to the agreement, was questioned on that point and answered as follows: "Q. How were the lots divided up at the time this agreement was made? \* \* \* Q. How did the land stand at that time? A. *There was a straight line running from Broadway to Fourth avenue; we made an agreement to set back the line fronting on Twenty-second street seven feet and a half.*" This witness says that when the agreement was made the parties had "the maps" before them. The court has annexed a diagram to the findings, which, perhaps, represents the maps; but as to this fact the evidence is very obscure and scarcely sufficient to support the finding.

But, admitting there was such a map before the parties at the execution of the agreement, what influence can that fact have on the interpretation of the agreement? The agreement speaks for itself. If it accord with the maps, well; but if it differ from the maps, they are not to control, but the agreement must control. The agreement is capable of interpretation by its own terms. The purpose of an agreement is to record, with precision, the mutual understanding of the parties. When the terms of it are free from ambiguity, everything *dehors* the writing is excluded, and all matters of negotiation and discussion on the subject are merged in the instrument. (*Kain v. Olds*, 2 Barn. & Cress., 627; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 273; *Dean v. Mason*, 4 Conn., 428.) Moreover, it is a well settled rule, and one that is acknowledged in all the cases on the subject, that parol evidence is inadmissible to supply or contradict, enlarge or vary the words of a written instrument. The reason assigned is, that to allow a contract in writing to be enlarged or varied by oral testimony would be to substitute parol for written evidence under the hand of the party, and it would lead to

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uncertainty, error and fraud. (*Piersons v. Hooker*, 3 Johns., 68; *Jackson v. Foster*, 12 id., 488.) Unless there be such an ambiguity in the terms of the contract as to require the application of extrinsic evidence to remove or explain it, the extrinsic evidence is wholly inadmissible.

Now, there is nothing obscure or ambiguous in the contract in question. It is plain and perspicuous. Its intent and effect are apparent. If there be no preconceived theory to which it is attempted to make it bend, the mutual intention of the parties to the instrument, when they executed it, cannot be a difficult subject of inquiry. In the first place, it recites that the parties are severally owners "of divers lots of land," one of them of lots on the northerly side, and the other of them of lots on the southerly side "of Twenty-second street, between the Fourth avenue and Broadway." Confessedly, this recital intends to cover all the land on both sides of Twenty-second street from the Fourth avenue to Broadway. It includes, beyond question, what is now called the Broadway lots.

After such recital, the agreement proceeds as follows: "And whereas, divers dwelling-houses of brick or stone have been erected on each side of said street, which have been set back seven feet and six inches from the line of the street, thus leaving a court-yard in front of said houses seven feet and six inches between the said houses and the line of the street; and the parties hereto deeming it to be for their mutual advantage that *the lots fronting said street when built upon between the said Fourth avenue and Broadway should be occupied exclusively by dwelling-houses, and that the fronts of all such dwelling-houses should be placed back seven feet and six inches from the line of the street, so as to range with those already built of brick or stone, and that no nuisance should be permitted on said lots between the Fourth avenue and Broadway aforesaid*, do, for themselves and their respective heirs and assigns, grant and agree to and with each other that *so much of their said respective lots belonging to them respectively as is contained between the line of*

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the street and a line seven feet and six inches therefrom shall forever hereafter remain and be enjoyed as a court-yard in front of any *houses to be erected on said lots*; and the parties, for themselves and their respective heirs and assigns, mutually consent and agree to and with each other that neither they nor their respective heirs or assigns shall or will erect or carry on, or permit to be erected or carried on, upon *any part of the respective lots*, any slaughter-house, smith's shop, furnace, steam engine, brass foundry, nail or other iron factory, or any manufacturing of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery or any other noxious or dangerous trade or business; and also that in case they respectively do or shall at any time hereafter convey *any or either of the said lots of land to them respectively belonging as aforesaid*, that *there shall be inserted in the deed or deeds of conveyance thereof*, to be executed by the grantee or grantees therein, proper covenants *in relation to the lot or lots thereby conveyed, binding such grantee or grantees*, his or their heirs and assigns, specifically and *particularly to observe, perform and keep all and every of the conditions, covenants and provisions contained in this agreement relating to the said lot or lots.*"

When the parties recited their respective ownerships of the lots, they described them as "lots of land on the northerly side of Twenty-second street, between the said Fourth avenue and Broadway;" and as "lots of land on the southerly side of Twenty-second street, between the said Fourth avenue and Broadway." There was no exclusion of any lots on Broadway. The whole land lying between Fourth avenue and Broadway was included; and it was spoken of as lots on the southerly side and on the northerly side of Twenty-second street, between Fourth avenue and Broadway. In the next recital the parties state that they deemed it to be for their mutual advantage that the lots fronting said street, when built upon, between the said Fourth avenue and Broadway, should be occupied exclusively by dwelling-houses; and that

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the fronts should be placed back seven feet and six inches from the line of the street, so as to range with those already built, and that no nuisance should be permitted on said lots between the Fourth avenue and Broadway aforesaid. Can any one doubt that this recital includes all the lots between Fourth avenue and Broadway? It is very clear that it does include all the lots, and that none are excepted. The recital shows that the parties contemplated the erection of dwelling-houses only on the premises, and had in view the fronting of all of them on Twenty-second street. This is made more apparent by the expression "that no nuisance should be permitted on said lots between the Fourth avenue and Broadway aforesaid." It will scarcely be contended that such expression does not include the whole land, on either side of Twenty-second street, between Fourth avenue and Broadway; and if so much be conceded, it follows that the same lots which are thus restricted against nuisances are those on which the buildings are to recede seven feet and six inches, "so as to range with those already built."

The parties, in the recitals of the agreement, had thus referred to their land as *lots on Twenty-second street*; and when the operative words of the agreement begin, the language is equally explicit. They "do, for themselves and their respective heirs and assigns, grant and agree to and with each other that so much of their *said respective lots*, belonging to them respectively, as is contained between the line of the street and a line seven feet and six inches therefrom shall forever remain and be enjoyed as a court-yard in front of any houses to be erected on *said lots*;" and neither the parties nor their heirs or assigns shall erect or permit any nuisance "upon *any part of the respective lots*." They further covenanted that when either of them thereafter should convey "*any or either of the said lots of land*, to them respectively belonging as aforesaid," there should be inserted in the deeds of conveyance thereof proper covenants binding the grantees, their heirs and assigns, "specifically and particularly to observe, perform and keep all and every of the

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conditions, covenants and provisions contained in that agreement relating to *the said lots*." There is no exception here of lots on Broadway; nor any language from which such an exception can be implied. By express terms all the lots are defined as fronting on Twenty-second street; and when any conveyance of any or either of the lots should be made, covenants against the nuisances, and requiring the buildings to be set back seven feet and six inches from the line of Twenty-second street, were required to be inserted in the conveyance.

Two things are obvious on reading the agreement. The first is that the parties to it contemplated an apparent widening of Twenty-second street from the Fourth avenue to Broadway; and the next is that the parties referred to their land on either side of the street as lots fronting on Twenty-second street. The boundary on the Fourth avenue and on Broadway was made subsidiary to the purpose of the parties, as evinced by the agreement, which was to create a courtyard space on either side of the street from Fourth avenue to Broadway, and to restrict the lots against nuisances. The owners of the land had certainly a right to make the same subject to the agreement; and no good reason for abrogating or modifying the agreement can be found in the fact that the land on Broadway has become more valuable for business purposes than was anticipated when the agreement was made.

It is said that the corner lot on Broadway will be mutilated and lessened in value if the construction of the agreement be such as to include that lot. The answer is obvious. The agreement was not made with reference to the benefit to the corner lot alone, but with reference to the benefit to all the lots on Twenty-second street between the Fourth avenue and Broadway. Another suggestion, made by counsel on the argument, was that if the parties had intended to include the Broadway lots in the agreement it was easy to have done so by express and unequivocal language. It may be answered, the description employed by the parties clearly does embrace



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the Broadway lots, as they are now called; and if the parties had intended not to include them in the terms of the agreement, it was not only easy but necessary for them to except those lots from the operation of the agreement. This they did not do; and, by fair interpretation, they must be held to be within the agreement.

The judgment of the Special Term should be modified by extending the injunction to all the land on the southerly side of Twenty-second street, westerly of the lot owned by the plaintiff, and between that lot and Broadway, with costs to the plaintiff.

Judgment accordingly.

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JAMES C. LUCE, Respondent, v. RICHARD T. HARTSHORN  
et al., Appellants.

(GENERAL TERM, FIRST DEPARTMENT, DECEMBER, 1872.)

By an agreement in writing between the members of an association it was provided that the plaintiff, a member thereof, should furnish certain information to such association, not specifying whether by parol or otherwise. The association afterward resolved, without assent of the plaintiff, that such information should be entered by him upon books provided for that purpose. *Held*, in an action brought for an accounting against other members of the association, that a finding that plaintiff was bound to comply with the resolution, when notified to do so, was sufficiently favorable to defendants.

Whether the plaintiff was bound to comply with a resolution by which the terms of the original agreement were varied, without assenting thereto, *quære*.

The rule, that the property of a partnership shall be first applied to the payment of the debts before any division of the assets, applies where one of the members is to be compensated for his services out of the profits. But an amount due a member for services, out of profits, as shown by an account rendered him, and acted on by the partnership, is recoverable, although a greater claim by a stranger, as to which the partnership denies liability, and, not noticed in the account, is proved in the action. Nor can the partnership avail itself of such a claim against it as a defence to the recovery without pleading it as such.

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THIS was an appeal by the defendants from a money judgment entered upon the report of a referee on a claim arising as follows:

On the fifth day of July, 1866, the defendants, as partners, were the proprietors and publishers of a work known as *The American Lloyds' Register of American and Foreign Shipping*, and they entered into an agreement on that day with certain inspectors of marine insurance companies in the city of New York, including the plaintiff as the representative of the Great Western Insurance Company, by which the inspectors agreed to furnish to the defendants, when called upon, such reports of inspection of vessels as they might make as such inspectors; and that they would furnish to defendants, when requested, such information in regard to vessels as they might obtain, from time to time, so as to lead, so far as could be, to a uniform classification and rating of vessels with reference to insurance; and with that view they would use their influence to promote the circulation, standing, stability and usefulness of the said *Register*. And in consideration of said inspectors rendering such service and information, the said defendants agreed to share equally with said inspectors in fifty per cent of the net profits arising from the sale of the *Register*, supplements thereto, and the moneys arising from the surveys and classification of vessels; the agreement to continue in force with the inspectors only so long as they should continue to be such inspectors of said companies, and the defendants should continue to be proprietors and publishers of said work. This agreement was not under seal.

Upon the execution of this paper the parties organized themselves into an association or board, which they termed the American Lloyds', or Lloyds' Association, and which had a president, treasurer and secretary, and of which the plaintiff was chosen president and the defendants treasurer and secretary.

On the thirtieth day of June, 1868, a resolution was duly adopted by said association, as follows:

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"Whereas, it was the original intention of this association that the members should record the reports of their daily inspections in this office.

"It is therefore resolved, that one inspector of each insurance company who may be a member of this association shall write in the books provided for that purpose a report of such inspection or inspections as he may have made within two days of the time of making such inspections. Provided always that such reports have not been previously written in said books."

Immediately after that resolution was adopted, the defendants prepared books pursuant thereto, one for each class of vessels, and had them duly alphabetized. These books were kept at their office and were accessible to the inspectors and all parties interested in furnishing the requisite information.

On the thirteenth day of July, 1868, the plaintiff was duly notified of the passage of that resolution. After that time the plaintiff made inspections of vessels as such inspector, but did not enter the same in the said books provided by the defendants.

It was proved that the plaintiff was and always had continued to be the inspector of the Great Western Insurance Company from the time he executed this agreement until he commenced this action. The defendants rendered to the plaintiff their accounts from July, 1868, to July, 1869, from which the balance appeared to be \$11,337.35. The plaintiff stated to them they had made an error in their accounts of 1868, which they had admitted and agreed should be corrected in these accounts. A book-keeper examined the accounts, and found the error was \$549.50, and the defendants agreed that amount should be added, which made \$11,886.84. Half of this belonged to the defendants. The interest of the plaintiff was in the balance, one-eleventh of \$5,943.42, being \$540.31, on account of which the plaintiff had received \$212.21, leaving due him \$328.10. On or about the 5th of July in each year the defendants made up

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an account, rendering it to each party interested with them, according to the stipulation of the agreement.

On or about the first day of September, 1869, the plaintiff commenced this action against the defendants, claiming that there was due him from defendants on account of the profits of said business the sum of \$328.10 and upward, asking judgment, with other relief, that an account be had and that the defendants pay the amount due.

The defendants answered setting forth the agreement, &c., and averred that the plaintiff had not fulfilled the same, but had confederated with other persons in aid of a rival publication, and refused to perform, claiming damages in \$5,000 as a counter-claim. They also claimed payment in full of plaintiff's demand. The plaintiff denied counter-claim.

The issues were referred to a referee to hear and determine. Among the other facts adduced, the defendants showed that by reason of alleged unskillfulness or negligence a claim was made against the association that might exhaust this entire amount. This claim was not admitted by the association, but it was claimed by them that they were not liable therefor. The referee was, among other requests, requested by defendants to find as follows: "That it became the duty of the plaintiff, under said contract, to make all entries of the inspection of vessels made by him as such inspector in the said books prepared by the defendants, from and after his notification of the passage of said resolution," and so found, with the addition of the words "when called upon."

The referee decided as matter of law that the plaintiff was entitled to judgment against the defendants for \$328.10, and interest from July 1st, 1869, amounting to \$356.80, with costs.

To this decision the defendants duly excepted, and appealed from the judgment entered on his report.

*Wm. Henry Arnoux*, for the appellant.

*T. R. Strong*, for the respondents.

Present—INGRAHAM, P. J., and BRADY, J.

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INGRAHAM, P. J. Whether or not the plaintiff was guilty of neglect in performing his duties under the contract made with the defendants, and whether or not the plaintiff had and has influence in promoting the success of the undertaking, were questions of fact to be decided by the referee, and his findings based on contradictory evidence cannot be disturbed. So far as relates to the binding effect of the resolution passed by the association after the contract was made, the defendants have no cause to complain of the finding, that the plaintiff was bound to comply therewith when notified so to do. It may well be doubted whether such resolution could be adopted so as to alter the terms of the original contract, or to add to it new conditions not contained therein. The giving the information required could be by parol, and nothing in that contract called for keeping books as required by the resolution.

The only point causing any doubt as to the propriety of the report is as regards the claim made against the association for a false certificate.

It is undoubtedly the rule that the property of a partnership shall be first applied to the payment of the debts of the concern before there can be any division of the assets, and it is also the rule that when a person is to be compensated for services out of the profits, the same rule would apply, and there would be difficulty in ascertaining such profits until the claims against the firm were adjusted.

I am inclined, however, to the opinion that the defendants cannot insist upon the application of either of these rules to the present case:

1st. The claim is not admitted by the defendants to be a valid claim, but they deny their liability therefor.

2d. The defendants have rendered their account up to July, 1869, without noticing such claim, and they had previously acted on accounts so rendered as fixing the rate of compensation for the year.

3d. No such defence is set up in the answer, and it is not therefore available in the present action.

The rendition of the account of receipts and profits for the

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year, if accepted by the plaintiff, may be considered as an account stated, and as such would bind the defendants, and the omission to set up this matter as a defence in the answer would also preclude the use of it upon the trial. (*Powell v. Noye*, 23 Barb., 184.)

The judgment should be affirmed.

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C. HART SMITH and others, Respondents, v. ELIAS T. MILLIKEN  
and others, Appellants.

(GENERAL TERM, FIRST DEPARTMENT, 1872.)

A delivery made, under an unwritten contract for sale of goods in value over fifty dollars, to one of several joint purchasers and acceptance by him, renders the contract valid as to all.

The contract provided for payment by note, payable in sixty days. *Held*, that by a delivery of the goods without receipt of the note the terms of the contract were not changed, and that the vendor on demand of the notes and a refusal could maintain an action for immediate payment.

THIS action was brought to recover for breach of defendants' agreement to give their note or draft due in sixty days on a joint purchase of 294 barrels of oil, claimed to have been sold to them by the plaintiffs on the 21st January, 1869, for the sum of \$6,096.96, and to have been delivered to them on that day.

The complaint set forth the sale and delivery and agreement on the part of defendants, and alleged a demand of the note or draft by plaintiffs of defendants pursuant to the agreement, and defendants' refusal to deliver the same, and claimed that the above amount, being the price agreed upon for said oil, became due upon such refusal.

The answer denied the sale to the defendants by plaintiffs, and claimed that the sale and delivery was by Chambers Brothers to the defendant, Parsons.

The testimony on the part of the plaintiffs, given on the trial, which was by jury, showed the following state of facts:

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Prior to the 20th of January the plaintiffs had sent from Baltimore, as a sample, five barrels of this oil, three of which were received by the firm of Chambers Brothers, doing business as brokers and commission merchants in the city of New York.

The brokers sampled the oil, and offered it for sale by the sample on the 20th of January. On the morning of that day the plaintiff Smith arrived in New York, bringing with him a bill of lading for 289 barrels, the remainder of the lot of oil, which had been shipped at Baltimore for New York on the day before, and made his head-quarters at the office of Chambers Brothers, the brokers. Negotiations for the sale of the oil to the defendants were entered into on the 20th, and on the 21st the defendants made an offer for the oil, which was reported to Mr. Smith by the brokers, and was accepted by him, and notice of that acceptance immediately given to the defendants. The terms of sale were a joint purchase by the defendants, with a note or draft at sixty days, to be made by one of the defendants, and indorsed or accepted by the others.

Afterward, and on the 23d of January, the five barrels previously shipped were delivered to Parsons, one of the defendants. Late in the afternoon of the 23d, the 289 barrels not yet having arrived from Baltimore, Mr. Smith, who had retained possession of the bill of lading of the oil since his arrival in New York, indorsed the bill of lading and delivered it to the brokers, or gave the brokers an order on the Transportation Company for the oil, so as to enable them to deliver the oil to the purchasers upon its arrival, and Mr. Smith left for Boston on the evening train at eight o'clock.

The oil arrived on the morning of the 25th, and notice thereof was immediately given to the defendant Parsons, one of the purchasers, who ordered it gauged, and who inspected it, and, at about five o'clock that afternoon, shipped the entire lot to Boston by steamer.

Down to this time and afterward, no bill of lading

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or order of the plaintiffs, or any other documentary title whatever was ever exhibited to the defendants, showing that Chambers Brothers held or had possession of the oil; nor did Chambers Brothers themselves hold such documentary evidence, nor any evidence of title, except the order given them by Mr. Smith, just as he was leaving for Boston, to enable them to deliver the oil to the defendants.

When the brokers called upon the defendants to settle for the oil on the 27th of January, the defendants tendered to the brokers in payment two protested notes made by one Conlan, and on which Chambers Brothers were the indorsers, and claimed they had the right to set off those notes against the oil. A demand was made on the defendants for the note or draft which they had promised to give for the oil, which was refused. The defendants knew that Chambers Brothers' business was that of brokers and commission merchants, and that the oil was not in their possession at the time of the contract.

The answer did not set up the holding of the notes by the defendants, nor did it claim the right to set off those notes. On the trial the court, on the application of the defendants' counsel, refused to permit an amendment of the answer of the defendant Parsons, so as to set up the notes as a counterclaim, and held that, "upon the facts as they stand proven, the defendants had no right to offset this claim upon Chambers Brothers against the claim of the plaintiffs Smith, Page & Co."

The trial was by jury, who found a general verdict for the plaintiffs for the amount claimed by the complaint; and from the judgment entered on the verdict and order denying a new trial this appeal was made.

*F. C. Nye*, for the appellants.

*R. H. Huntley*, for the respondents.

Present—INGRAHAM, P. J., and DAVIS, J.



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INGRAHAM, P. J. Admitting that the contract for the sale of the oil, when made, was within the statute of frauds, still the facts submitted to the jury and found by them dispose of that question. The question was submitted to them whether this was a joint purchase for the benefit of Milliken & Co., and Parsons; and if it was delivered on the joint purchase, a receipt by one of the purchasers inured to the benefit of all, and made the contract valid.

The verdict found such to be the fact, and we see no error on this point, either in the charge of the court or the finding of the jury. The evidence fully warranted such finding, and the instruction that receipt of part by Parsons was a delivery to all, was not erroneous. There is nothing in *Caulkins v. Hellman* (47 N. Y., 449) that conflicts with these views. In that case the merchandise was delivered at a railway station; and it was held that it must also appear that it was accepted by the purchaser. No such distinction can be made where the delivery and acceptance were contemporaneous acts. The delivery personally to one of the parties was a personal acceptance by that party, and all became bound thereby. The delivery unconditionally of the oil did not change the terms of the contract so as to relieve the defendants from the mode of payment specified at the time of purchase. The only effect of such a delivery was to waive any right to receive payment as a preliminary to passing the title to the property, if the defendants sold it before making payment to a *bona fide* purchaser. The plaintiffs still had a right to demand the notes, and, in case of refusal, to claim immediate payment. It did not separate the giving of the note from the credit to be allowed if the note was given, so as to deprive the plaintiff of the former and leave him bound by the latter. The giving of the note and the credit were but one act, and could not be separated by any such act.

The question as to the time of delivery of the four barrels was a question of fact for the jury, in passing upon the question whether the sale was on joint account, with which we cannot interfere. It was not a matter of right to have the

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answer amended; and the refusal to allow such amendment was an exercise of discretion on his part with which the court will not interfere.

We see no error in the charge calling for a new trial. The claim to set off the notes indorsed by Chambers Brothers was properly disposed of. It appears that the whole defence was based on an attempt to get possession of the property, and to pay for it in those notes.

There was nothing to warrant such a defence, and no error in the court refusing to charge on that point as requested by the defendants.

Judgment should be affirmed.

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ISAAC J. DRAKE v. THE MAYOR, &c., OF THE CITY OF NEW YORK.

GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1873.)

The provisions of section 8 of chapter 882 of Laws of 1870, prohibiting the board of supervisors of New York county from creating any new office or department, &c., are, *it seems*, embraced within the title of the act, and constitutional. (Per DAVIS, J.)

Section 6 of chapter 264 of 1858, by which the police justices are empowered to appoint for their courts "such other clerical help \* \* \* as shall be deemed necessary by the board of supervisors," does not give the appointing power to the supervisors, but to the justices.

*Held*, accordingly, that an appointment made under that section of an assistant clerk, ratified by the board of supervisors, was not an appointment by the supervisors, and not prohibited by section 8 of chapter 283 of the Laws of 1870.

The restriction upon the power of increasing salaries made by section 11 of chapter 876 of the Laws of 1869, is within the scope and title of that act.

The board of supervisors of New York by resolution fixed the plaintiff's salary as assistant clerk of the Police Court at the same amount as allowed to the clerks of that court. The amount of salary allowed to these clerks had been fixed at \$2,500 and increased to \$4,000. *Held*, the increase being illegal under chapter 876 of 1869, that the resolution of the supervisors must be construed to have intended the amount *law*

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*fully* allowed to those clerks, viz., \$2,500, and that plaintiff must be deemed to have known the illegality of the increase.

The non-presentment for audit of a claim for official salary against the city of New York, accrued during 1871, to the board of auditors created by chapter 9 of 1872, does not work a forfeiture of the claim, but only of the right to demand payment out of the moneys raised under the provisions of that act.

The provisions of section 10 of chapter 876 of 1866 are applicable only to the appropriations made by that act.

MOTION for judgment on a verdict taken subject to the opinion of the court at General Term. The facts are stated in the opinion.

*Joseph H. Dukes*, for the plaintiff.

——— *Dean*, for the defendant.

Present—INGRAHAM, P. J., DAVIS and FANCHER, JJ.

DAVIS, J. By section 6 of chapter 264 of the Laws of 1858, the police justices were empowered to appoint for the respective courts at which they might be assigned "such other clerical help, to be denominated assistant clerks, as shall be deemed to be necessary by the board of supervisors of said county, upon the application of said justices." The same section provided that the salary of such assistant clerks should be fixed by the board of supervisors, and that their term of office should be the same as the clerks of those courts.

On the first of May, 1870, one of the police justices, assigned to and holding the Fourth District Police Court, appointed the plaintiff as Police Court clerk, and notified the board of supervisors that the business of the court requiring additional clerical help, he had made such appointment, and requested the board to fix a salary for such clerk. In compliance with this request the board of supervisors passed a resolution on the 26th day of May, 1870, which was approved by the mayor on the same day, fixing the salary of plaintiff "at the same amount as is now allowed Police Court

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clerks; said salary to date from the time of his appointment, May 1, 1870."

This resolution was, in legal effect, a declaration that the "additional clerical help" was deemed necessary by the board, and operated as a ratification of the act of the police justice in making the appointment.

It is insisted on the part of the defendant that the appointment of plaintiff was void, because in violation of the provisions of chapter 382 of the Laws of 1870. The particular provision referred to is in the third section of the last named act, and in the following words: "and the board of supervisors of the county of New York are hereby prohibited from creating any new office or department, or increasing the salaries of those now in office or their successors."

The constitutionality of this provision has been elaborately discussed by counsel; the ground asserted being that it is not embraced within the title of the act, as required by the sixteenth section of article 3 of the Constitution of this State. I am strongly inclined to the opinion that the provision is not obnoxious to any constitutional objection; but it is unnecessary, I think, to determine that question. The appointment in question was not made by the board of supervisors; nor is the authority to make it conferred upon them by law. The act of 1858, under which the plaintiff was appointed, gives the power of appointment to the police justices, with a limitation upon the power that prevents its exercise except when the board of supervisors deem it to be necessary. The expression of the opinion, on the part of the board, that "the additional clerical help" appointed by the justices is deemed to be necessary is not the creation of an office by the board, within the meaning of the prohibition of the act of 1870. The office is created by virtue of the power given by law to the police justices. The board of supervisors have no power to create the office. They may assent or dissent to its necessity; and there, so far as affects the question of appointment, their power ends. They are not prohibited from expressing their opinion on the question

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whether an office, the power to create which is vested in some other board, officer or department of the city, is necessary and proper or not; and public policy requires that an act forbidding the board to create a new office should not be held to prohibit the exercise of appointing powers expressly conferred by law on others.

The resolution of the 26th of May, 1870, fixed the salary of the plaintiff "at the same amount as now allowed Police Court clerks." By the ordinance of December 31st, 1864, the salary of such clerks was fixed at \$2,500 per annum. On the 20th of December, 1869, the board of aldermen adopted a resolution fixing the salary of the Police Court clerks at \$4,000; and the board of assistant aldermen also adopted the resolution on the 24th of December. The mayor returned the resolution without his approval and without objection. By section 11 of chapter 876 of the Laws of 1869, the common council were expressly prohibited from increasing the salaries of officials then in office. It is insisted that this prohibition was unconstitutional because it relates to a subject not expressed in the title of the act. I think this objection is not well taken. The act was one for the purpose of providing for the raising and disbursing of moneys required for municipal purposes; and the restriction upon the increasing of salaries is a subject within both its scope and title. (*Sun Mutual Ins. Co. v. The Mayor*, 8 N. Y., 252; *People ex rel. Davies v. Commissioners of Taxes*, 47 N. Y., 504.)

The resolution of the 20th of December was, therefore, void; it having been adopted in violation of express law. The plaintiff must be held to know that the common council, in passing that resolution, were acting without authority, because every man is presumed to know the general laws of the State, and the limitations imposed by them upon public officers. (*Donovan v. The Mayor*, 33 N. Y., 291, 293, and cases cited by PORTER, J., at p. 293.)

It follows that the resolution of the board of supervisors of May 26, 1870, fixing plaintiff's salary at the amount then allowed Police Court clerks, must be deemed to mean the

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amount *lawfully allowed*; to ascertain which, reference must be had to the ordinance of 1864, which fixed the salaries at \$2,500.

The only remaining question necessary to be alluded to is whether the recovery, at the rate above named, can be had for the salary which accrued in 1871. The objection made is that the salary for that period was not audited by the board of audit created by chapter 9 of the Laws of 1872, and as provided for by the same section of that chapter. I am of opinion, since there are no words of exclusion precluding the payment of salaries legally fixed, and which were past due, unless first so audited, that that section must be construed to require such auditing in order to entitle the salary to payment out of the fund authorized to be created by that act. If plaintiff failed to have his salary, accruing in 1871, audited by that board, he had no title to demand its payment out of the moneys raised under the provisions of the act; but, in my judgment, his failure to entitle himself to participate in those moneys did not work a forfeiture of the salary itself.

The sixth section of chapter 586 of the Laws of 1867 has, in my opinion, no application to the case. It is by its terms limited to judgments "in actions upon contract, made in the year one thousand eight hundred and sixty-six." The plaintiff's contract was not made till May, 1870. If counsel intend to refer to the tenth section of chapter 876 of the Laws of 1866, I think that section should be regarded as applicable to appropriations made by that act.

The principle of *Donovan v. The Mayor* (33 N. Y., 291) does not apply to this case, as is clearly shown by FANCHER, J., in the case of *Quinn v. The Mayor, &c.* (MSS. of FANCHER, J.).

It follows that plaintiff is entitled to judgment for his salary from first of September, 1871, to first of August, 1872, at the rate of \$2,500 per annum.

Judgment accordingly.

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Orr v. Gilmore.

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DAVID ORR, Respondent, v. WILLIAM GILMORE and SAMUEL  
KISSICK, Appellants.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1873.)

A fraudulent intent being established, against the vendor and vendee in a conveyance for a valuable consideration, by a judgment creditor of the vendor, he is not entitled to judgment setting aside and annulling the conveyance, but only that the property be sold and his judgment paid out of the proceeds.

The declarations of the grantor, made after the conveyance, are not evidence to charge the grantee with a fraudulent intent in taking the conveyance.

THIS was an appeal from a judgment entered against the defendants on a decision of a justice of this court without a jury.

The action was brought by the plaintiff as a judgment creditor of the defendant Gilmore, to set aside a conveyance of certain real estate in the city of New York, made by the defendant Gilmore to the defendant Kissick on the 5th of November, 1869, on the ground that the conveyance was made with intent to defraud the creditors of the defendant Gilmore.

*Albert Stickney*, for the appellant.

*A. R. Dyett*, for the respondent.

Present—INGRAHAM, P. J., BRADY and LEARNED, JJ.

INGRAHAM, P. J. The justice, before whom this case was tried, has found that the plaintiff was a judgment creditor on a judgment for \$1,074.75, recovered 21st of January, 1870; that the defendant Gilmore was the owner of the lot of land and premises in question prior to 5th of November, 1869, on which day he conveyed the same to defendant Kissick; that the consideration in the deed was \$20,000, of which a mortgage on the premises for \$10,000 was to form part of the payment, and was assumed by Kissick; that Gilmore owed Kis-

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sick \$2,300 advanced in 1868; that there was interest on the mortgage and taxes on the land unpaid, the amount of which was not found. As matter of law, he found the conveyance was null and void, and should be vacated and set aside; and declared the property to belong to Gilmore, and subject to the payment of his debts. Judgment was so ordered. The evidence shows that Kissick, in addition to the \$2,300 and interest due him, assumed or paid the interest on the old mortgage \$350; taxes \$181.60; assessments \$165.78.

These sums, together, make about \$3,000, for which Kissick held the conveyance, besides the assumption of the mortgage for \$10,000; making, in all, the sum of \$13,000. Whether these items were put in the deed, to be paid by the grantee, or were paid by him as part of the consideration money, would be immaterial.

It is not necessary to examine all the exceptions taken to this judgment. Even if it be conceded that there was sufficient evidence to charge Gilmore with a fraudulent intent, of which there is no sufficient evidence as to the defendant Kissick, still that fact will not sustain the judgment in this case. Orr was a judgment creditor to the amount of \$1,074.75. If the deed was found to be void as against him, all the judgment he was entitled to was the sale of the lot and the payment to him of that amount, interest and costs. The conveyance to Kissick was valid as between him and Gilmore; and there was nothing to warrant the judgment declaring the same null and void as to every one. The case of *Chautauqua Co. Bank v. Risley* (19 N. Y., 369) is referred to as authorizing such a judgment; but in that case the judgment directed the appointment of a receiver to sell the property to pay the plaintiff's claim, and the defendant claimed as purchaser under previous title. In the present case the judgment declares the property to belong to the debtor.

The declarations of Gilmore, made after the conveyance, were improperly admitted, excepting for the purpose of proving a fraudulent intent on the part of the vendor. But they were not evidence for the purpose of charging Kissick



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with a fraudulent intent; and without them there is not sufficient evidence for that purpose.

The judgment must be reversed and a new trial ordered, costs to abide result.

Judgment reversed.

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LEWIS J. PHILLIPS, Respondent, v. SAMUEL SCHIFFER,  
Appellant.

(GENERAL TERM, FIRST DEPARTMENT, MARCH, 1873.)

The recital in a sheriff's deed of real property sold under execution, of the issuing of the execution, is not, *it seems*, sufficient proof of that fact in favor of the purchaser.

But where the sheriff also testified that the writ was issued and delivered to him, and that he made the sale under it, and produced his register, in which official entries had been made by him of the issuing of the writ contemporaneously with its issue, some forty years previously, and there had been uninterrupted occupation under his deed for nearly the same time,—*Held*, the proof was sufficient to sustain a finding of the issuing of the writ.

Neglect of the sheriff to return the execution does not affect rights acquired by purchasers at a sale regularly made under it.

The principal object of the act of 1835 (chap. 189) was the protection of sheriffs by creating a statutory mode of evidencing the claims of assignees of their certificates of sale, without which they could not be *compelled* to convey to such assignees. The sheriff may waive the protection, and if he does so and conveys to an actual assignee, the title of his grantee will not be affected by omission to prove and file the assignment of the certificate.

APPEAL from judgment entered on report of referee.

*M. A. Kursheedt*, for the appellant.

*Isaacs & Sanger*, for the respondent.

Present—INGRAHAM, P. J., DAVIS, J.

DAVIS, J. This action was brought to compel the specific performance of a contract for the sale of three lots on the south-east corner of Eighty-seventh street and Fifth avenue. The defendant refused to accept the conveyance; on the

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grounds, first, because there was no legal evidence, by record or otherwise, that any writ of *feri facias* had been issued to the sheriff upon the judgment under which the premises purported to have been sold; second, that the sheriff's deed to Harriet M. Wisewall was invalid because executed before said Wisewall had caused the assignments to herself and to other intermediate assignees to be acknowledged or proved and filed, in accordance with the provisions of section 2 of chapter 189 of the Laws of 1835; third, that the sheriff acted without authority of law in executing the deed of the premises to Harriet M. Wisewall, inasmuch as it appears by the certificates of sale that he sold the premises to Daniel Robert and Isaac H. Underhill, there being no legal evidence, of record or otherwise, proving any assignments of the certificates of sale from Robert and Underhill to Mrs. Wisewall. It was admitted by defendant that the plaintiff's title appeared on the records to be perfect in all respects, except for the defects thus specifically pointed out.

It appeared by the testimony of Jacob Westervelt that in 1832 and 1833 he was sheriff of the city and county of New York; that he acted as sheriff in making a sale of the premises on a *fi. fa.*, issued to him out of the Superior Court of the city of New York on the 24th of December, 1832, on a judgment at the suit of *Benjamin Brewster v. The New York and Harlem Spring Water Company*, in an action of assumpsit, for \$384.10. The register then kept by the witness as sheriff was produced; and the entries therein, which he testified were made at the time of receiving the execution, were read, showing in substance the facts above stated.

Two certificates of sale executed by him were also produced and proved, which recited the sales under the *fi. fa.*, and the purchase by Robert and Underhill, respectively, of parcels of said premises. These were executed on the 25th day of February, 1833, and filed March 6, 1833.

A deed, bearing date the 28th day of May, 1835, by Westervelt, as late sheriff, to Harriet M. Wisewall, was put in evidence. This deed contained full recitals of the *fi. fa.* in

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the suit above mentioned; of the sale on the 25th of February, 1833, of the premises; the purchase by Robert and Underhill respectively; the assignment by Robert and Underhill, severally, of their right, title and interest in the several lots and in the certificates of sale to Enoch Wisewall and Francis Price; the subsequent assignment of Wisewall to Price, and the assignment by Price to Harriet M. Wisewall on the 26th day of May, 1835. Each of the several assignments is recited to have been made "by an instrument in writing, under the hand and seal" of the assignor; and all, except the one to Mrs. Wisewall, bore date prior to May, 1835. The sheriff's deed was in due form and properly acknowledged. None of the assignments appear to have been filed in the office of the clerk of the city and county of New York, and none of them were produced. The sheriff testified that he always required the production and proof of assignments before he conveyed lands sold by him on execution to an assignee, and would not have recited the assignment in a deed unless the fact of assignment had been satisfactorily proved to him; that the certificate and assignment were delivered to him, and that it was not his custom to keep or file them, and that he destroyed the assignment after the deed was executed and delivered. The writ of *feri facias*, under which the sale was made, could not be found in the office of the clerk of the Superior Court, and no entry of its return or of satisfaction appeared on the docket of the judgment. The sheriff also gave evidence tending to show that it was not returned; and proved that the deputy sheriff, in whose particular charge it was put, was "a careless man," and was dead, and that he did not return the writ to the sheriff. By sundry mesne conveyances the plaintiff acquired the title of Harriet M. Wisewall.

On this evidence the referee found the issuing and delivery in due form to the sheriff of the *fi. fa.*, the sale thereunder, and the delivery of the certificates, the execution of the assignments to Mrs. Wisewall, and that the sheriff duly conveyed to her the premises sold; and the several other mate-

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rial facts alleged in the complaint (of which due proof had been given), and decided as a conclusion of law that the defendant was bound specifically to perform the agreement, and that plaintiff was entitled to judgment accordingly.

Nearly forty years had elapsed between the delivery of the *fi. fa.* to the sheriff and his sale thereunder, and the making of the contract between the parties to this suit; and the deed of the sheriff was executed in May, 1835, since when the plaintiff and they from whom he derived title have enjoyed undisturbed ownership, having clear record title, except as affected by the defects alleged by the defendant. The facts of the case are to be looked at through the atmosphere with which the lapse of nearly forty years surrounds them. There was no dispute as to the recovery of the judgment in the Superior Court; but it is insisted that the execution by virtue of which the sale took place was not proved. Conceding that the recitals of the sheriff's deed are not sufficient proof on that subject (*Anderson v. James*, 4 Robt., 35; *Jackson v. Shepard*, 7 Cowen, 88), yet here was direct and affirmative proof by the sheriff that the recited writ was issued and delivered to him, and that he made the sales under it; and this proof was corroborated by the production of the official entries of the delivery of the execution, made coterminously in the register of the sheriff. We do not think this proof falls within the cases cited. The neglect of the sheriff to return the execution, and its probable loss through the carelessness of his deputy, ought not to be held to affect rights acquired by purchasers at a sale regularly made under the writ. This would be to put titles acquired at sheriffs' sales at the mercy of the subsequent negligence of that officer. We think the first objection of the defendant was not well taken.

The second and third objections both relate to the assignments of the certificates of sale, and the failure to properly prove and file them. All the assignments, except the last, were made before the passage of the act of 1835. They were valid instruments when made, and undoubtedly carried to the assignees all the rights acquired, or evidenced, by the

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certificates of sale. The act of 1835 did not in any wise invalidate those instruments; and the last clause of the second section of that act expressly provided that it should "not be necessary to have acknowledged the execution of any assignment" theretofore made. The act of 1835 took effect on the 22d day of May; and, as the sheriff's deed bears date on the 28th of May, it is more than probable that the provisions of the act had not come to the notice of the parties. However this may be, the act of the sheriff in executing the deed reciting the several assignments, and recognizing the rights of Mrs. Wisewall under them, must be deemed a waiver on his part of his right to insist on the proof of filing of those instruments. The principal object of the statute of 1835 was the protection of sheriffs by creating a statutory mode of evidencing the claims of assignees, without which a sheriff could not be compelled to convey to such assignee. The sheriff could waive the protection of the statute; and if he did so, and conveyed to an actual assignee, the title of his grantee would not be affected by the omission to prove and file the assignment of the certificate. (*Wood v. Morehouse*, 45 N. Y., 368; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Canfield v. Westcott*, 5 Cow., 269; *Chautauqua Bank v. Risley*, 4 Denio, 484; *People v. Ransom*, 4 Denio, 147.)

We do not consider the case of *The People v. Ransom* (2 Comst., 490) to hold any different rule. That case substantially holds that a sheriff cannot be compelled to convey without compliance on the part of an assignee with the statute of 1835; but it does not decide that a conveyance by the sheriff without such compliance would not carry a good title.

We are of opinion that the substantial contents of the several assignments were sufficiently and properly proved by the recitals of the sheriff's deed (*Wood v. Morehouse*, 45 N. Y., 368); and that their execution and existence at and before the execution of the deed, and their loss or destruction, were satisfactorily shown by the sheriff. The findings of the referee were, therefore, sustained by competent evidence.

The judgment should be affirmed, with costs.

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Kilbourne v. Allyn.

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CHARLES T. KILBOURNE, Respondent, v. SETH B. ALLYN, impleaded, &c., with FREDERICK M. ST. JOHN and another, Commissioners, &c., Appellants.

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1878.)

An action, on behalf of the plaintiff and other tax-payers, to recover a tax alleged to have been unlawfully collected, and to restrain its disbursement by injunction, none of the other tax-payers appearing to join with him, will be regarded as the personal action of the latter.

Nor will such an action lie on behalf of other tax-payers, entitled to distinct payments out of the whole tax collected; or to prevent a multiplicity of suits, where the pleadings and evidence fail to indicate any purpose of others to sue, or their dissent from the proposed disbursement of the money.

And where it is neither alleged nor shown that other tax-payers are dissatisfied with the intended disbursement, a judgment directing repayment to them, for which they do not apply or authorize an application, cannot be sustained,

An injunction will not issue to restrain the disbursement of the plaintiff's portion of a tax, to meet interest on town railroad bonds issued without authority, where the commissioners holding the tax are abundantly able to answer for its loss.

In the year 1868, a majority of the taxable inhabitants of the town of Thompson, in Sullivan county, owning a majority of the taxable property on the assessment roll of their town, not including non-resident lands, consented in writing that the commissioners of their town could bond, on the credit of the town, the sum of \$148,000, at a rate of interest not exceeding seven per cent, for a period not exceeding thirty years, and execute under their hands and seals the bonds of the town for the same, to carry into effect the provisions of chapter 553 of the Laws of 1868, providing for the building of a railroad from Monticello, in Sullivan county, through the town of Thompson and another town of that county, to Port Jervis, in Orange county. This consent was afterward filed, as required by the other provisions of the act, and a company, called the Monticello and Port Jervis Railroad Company, was formed for the purpose of constructing and

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operating a railroad between those points. At the time when the consent was signed by the tax-payers this company was not formed. And neither that nor any other company was named in the consent, which it was proposed to aid by issuing the bonds of the town. But after the company was organized the commissioners did issue the bonds to the amount of \$148,000, and exchanged them for the stock of the railroad company. And since that time a portion of them at least have passed into the hands of innocent purchasers for value.

The company constructed the railroad, and is now operating and maintaining it between the points already mentioned. And the town has raised and paid one year's interest upon the bonds so issued by its commissioners.

In December, 1870, the commissioners of the town made a report to the board of supervisors of the county, under the provisions of the act of 1868, stating the amount that would become necessary for the payment of one and a half year's interest upon the bonds of the town. And the board directed the sum of \$15,721.30 to be levied on the town of Thompson to pay the same. This amount included three semi-annual installments of interest, maturing on the bonds on the first day of September, 1870, and the first days of March and September, 1871. The amount was included in the assessment roll of the town, and a warrant issued by the board to the collector of the town to collect the same from the tax-payers and property of the town. The collector proceeded under his warrant to collect the tax. And out of the moneys collected, he afterward paid over to the commissioners sufficient to pay the interest over-due on the bonds, and one of the commissioners paid the same. The residue of the moneys has since been collected and paid over by the collector, and has remained on deposit to the credit of Allyn, one of the commissioners. During the progress of its collection this action was commenced by the plaintiff, for himself, and for the benefit of all other tax-payers of the town, against the commissioners, to restrain them from paying over the moneys

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so collected in payment of the interest on the town bonds, and for its repayment to the plaintiff and the other tax-payers of the town. And a temporary injunction was issued in the suit, restraining the commissioners from paying the money in extinguishment of the interest accruing on the bonds.

Seth B. Allyn, the commissioner to whose credit the moneys collected stood on deposit, answered the complaint; the other two made default. The issue was tried before a referee, who reported in favor of the plaintiff, and directed a judgment making the injunction perpetual, and directing the commissioners to pay over the moneys to the treasurer of the county. After the payment of the costs of the parties to the action, he was to pay the residue to the tax-payers from whom it had been collected, or their legal representatives, in proportion to the amounts collected respectively from them. Judgment was entered upon the report, and the defendant Allyn then appealed to this court.

*C. V. R. Ludington* for the appellant.

*T. F. Bush* for the respondent.

Present—MILLER, P. J., DANFORTH and DANIELS, JJ.

DANIELS, J. This action appears to have been brought by the plaintiff, on the ground that the commissioners of the town were unauthorized under the statute to issue the bonds, because the consent of the tax-payers contained the name of no railroad company in whose stock the proceeds of the bonds should be invested by them. And the further ground that the bonds themselves were transferred directly to the railroad company, formed after the consent was obtained, instead of their proceeds, as the statute in terms required. It was in the consideration of these objections, and of the rights of *bona fide* holders of bonds issued under such circumstances, that the learned referee wrote his able and inter-



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esting opinion, through which he reached the conclusion that the plaintiff was entitled to judgment for the relief mentioned in his complaint.

The defendant excepted to the conclusions and directions of the referee by which he held that the injunction, restraining the application of the moneys collected from the payment of the interest accruing on the bonds of the town, should be made perpetual, and that judgment should be entered for that purpose, and for the distribution of such moneys by the treasurer of the county among the tax-payers of the town and their representatives in proportion to the amounts collected of them respectively. These exceptions are probably sufficient to present the point of the plaintiff's ability to maintain this action. For if he has shown no right to that relief, the judgment recovered by him should not have been ordered in his favor. His right, in that respect, must, therefore, be considered before the grounds on which the referee has placed the recovery can properly form the subject of examination.

Although he professedly brought the action for the benefit of himself and the other tax-payers of his town, no others appear to have joined him in the undertaking. And they probably could not have lawfully done so, since the interests of each one of the tax-payers in the money forming the subject of the controversy were distinct, personal, and peculiar to himself. (*Magee v. Cutler*, 43 Barb., 239, 260.) For both reasons the case must be considered and examined as the personal action of the plaintiff himself, affecting his rights solely, so far as they might be injured or prejudiced by the future action of the commissioners. This view is further fortified by the form which the plaintiff gave to his complaint. For while he alleged that a multitude of suits would be required to recover back the money if the commissioners were permitted to pay the interest upon the bonds with it, and the questions made were of common interest to all the tax-payers of the town, he did not show that there was the least danger of any such suits, or that any tax-payer beyond himself

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threatened or contemplated commencing any suit. So far as anything in the complaint, or by the evidence given on the trial of the action, was made to appear, it showed nothing from which the inference could be drawn that any other taxpayer of the town in the least degree dissented from the payment of the money for the extinguishment of the interest arising upon the town bonds. For that reason, even if such an action could be properly instituted to avoid a multitude of individual suits, the fact itself forms no part of the plaintiff's case. In order to maintain an action in equity for an injunction on that ground, it certainly should be made to appear by the pleadings and the proofs that other persons either threatened or designed to institute such suits. (*Magee v. Cutler*, *supra*; *Heywood v. City of Buffalo*, 14 N. Y., 534.)

As long as it was neither alleged nor shown that other taxpayers were dissatisfied with the payment of the interest upon the town bonds, the judgment providing for their reimbursement can in no view of the case be sustained. They applied for no such relief as was given them by the referee's direction, that the taxes collected from them to pay the interest on the bonds should be returned to them or their representatives, and conferred no authority upon the plaintiff to make such an application in their behalf.

The plaintiff alleged in his complaint that the defendants were good and responsible for several times the amount of the moneys remaining in their hands. And as that was the case, there was no foundation on which the action could be maintained for an injunction to prevent irreparable injury to his rights. The proportion of the tax paid by him under the warrant issued to the collector, applicable to the interest accruing on the bonds received by the commissioner, was thirty-four dollars and ninety-nine cents. And that could not well be endangered, even if an injunction was not issued for its protection, as long as the persons who had received it and were expected to make an unlawful use of it were responsible, as the plaintiff averred that they were.

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In fact, no injury was shown, either by the complaint or the evidence, which could possibly happen to the plaintiff or his property by the action it was apprehended the commissioners were about taking in the appropriation of the moneys one of their number had received, beyond the payment of the small sum claimed by him, toward the satisfaction of the interest maturing on the bonds. And that was clearly insufficient to constitute a ground of action for an injunction restraining such payment. For if they were not legally protected in such an appropriation of the money, they were abundantly able to answer for all its pecuniary consequences. "A party who brings an equitable action must maintain it upon some equitable ground; and if his cause of action is of a legal and not an equitable nature, he must bring a legal action or pursue a legal remedy. Where a matter is clearly a *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law." (*Heywood v. City of Buffalo*, 14 N. Y., 534, 540, 541.) That, the plaintiff in this case failed to do by anything either alleged or proved.

The fact that he was a tax-payer of the town, and that a tax had been collected from him without the authority of law, and there was danger that the amount would be devoted to an unlawful purpose, were not sufficient to enable him to maintain an action for an injunction. They failed to present a case within the rule just quoted, and similar circumstances have often been held to form no equitable cause of action. (*Mages v. Cutler*, *supra*; *Doolittle v. Supervisors of Broome County*, 18 N. Y., 155; *Susquehanna Bk. v. Same*, 25 id., 312; *Mutual Benefit Life Ins. Co. v. Supervisors of New York*, 32 How., 359; *Hasbrouck v. Kingston Board of Health*, 3 Keyes, 480; and *Ayres v. Lawrence and others*, 63 Barb., 454.)

If the plaintiff is right in maintaining that the bonds were issued without authority, and no debt has been created by

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them against the town in which he is a tax-payer, then the persons through whose agency his property may be seized and appropriated for their payment, or the payment of the interest accruing upon them, will be involved by that act in the commission of a wrong, and possibly, for that reason, legally liable for its value. (*Mygatt v. Washburn*, 15 N. Y., 316; *Bennett v. City of Buffalo*, 17 id., 383.)

So also he may maintain an action for money had and received against the functionary, without right, receiving and appropriating the proceeds of property unlawfully taken from him, and converted into money for the purpose of making such payment with it. (*Chapman v. City of Brooklyn*, 40 N. Y., 372; *Newman v. Supervisors of Livingston*, 45 id., 676; *Bank of Commonwealth v. Mayor of New York*, 43 id., 184.)

And without waiting until his property has been seized for the collection of what he may deem an unfounded demand, he may secure a review of the proceedings proposed to be taken for its appropriation by means of the writ of *certiorari*. (*People v. Com'rs, &c.*, 23 N. Y., 192; *People v. Board of Assessors of Albany*, 40 id., 154.)

If the plaintiff has a valid right to resist the payment of taxes imposed for the purpose of satisfying the debt mentioned in the bonds, the law affords him ample means for its protection, and for redress after its invasion, without the aid of either a temporary or perpetual injunction. The case stated and proved by him did not entitle him to redress by means of that remedy. For that reason the judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

DANFORTH, J., dissents.

Judgment reversed.

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Salisbury v. Morss.

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CAROLINE SALISBURY, Administratrix, with the will annexed, &c., Respondent, v. BURTON G. MORSS and others, Appellants.

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(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1873.)

Where a testator devised his real estate and directed the devisees to pay certain legacies, and, without any other bequests directed all his debts, liabilities and funeral expenses to be paid out of his personal estate, and the rest and residue, "not specifically devised and bequeathed," to be divided among his daughters and sons, it seems that there was a gift of all the personal, after payment of debts, liabilities and funeral expenses, to the children.

And, *held*, that a direction to a devisee to pay one of the legacies to the executors, partly within a year, showed a design to charge the estate devised to him, to the relief of the personalty.

And that this was so in view of other provisions of the will, although the testator distinctly charged an annuity for his widow upon real estate devised to certain other devisees.

It seems one who takes title to land from a party to an action, pending in regard to it, is charged, as his grantee would have been, by the judgment.

*Held*, also, that the charge followed the land in the hands of the devisees of the original devisee and their grantees, especially if the latter were chargeable with actual notice of proceedings involving the question of such charge, and that an action lay against them in equity, by the executor of the devisee, for its recovery.

And this was so where the executor might have paid the legacy out of the personal estate bequeathed to the devisee, and was also administrator, with the will annexed, of the devisee, and had administered his personal estate without provision for the legacy; the property of both estates having been administered under the provisions of the wills and directions of the surrogate in proceedings to which they were parties.

Letters testamentary issued on a will, and the executor received at the same time those of administration upon the estate of a deceased devisee who had become personally liable by acceptance of the devise for a legacy charged on the devised property,—*Held*, that the executor's only action for the legacy was in equity, and he was not barred by the six years' limitation at law.

And whether the executor's action would in any case not be for relief within section 97 of the Code, *quærs*.

It seems that, except as provided by subdivision 6, § 91, of the Code, actions for specific relief in equity are to be brought within ten years.

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*Held*, also, that an action would lie by the executor against the devisees, for the amount of the legacy, the same having been recovered of him by the legatee, and the judgment assigned to the executor's attorney.

THIS action was brought by Nicholas Brandow, as executor of the last will of John Brandow, deceased, to recover a legacy from real estate devised to the testator's son, Lucas E. Brandow, and at the time of its commencement owned by the defendants. The testator died the 3d day of February, 1859. By his will he appointed his two sons, Nicholas Brandow and Lucas E. Brandow, his executors. Lucas E. Brandow died on the 15th of March, 1859. The will was proved on the 7th of April, 1859, and letters testamentary issued to Nicholas Brandow, surviving executor, by the surrogate of Greene county. The executors' accounts were settled before the surrogate, and a final decree entered on the 8th of February, 1866. By this decree the provisions of the testator's will providing for the payment of this legacy were held to be void, and the legatee entitled to nothing by reason of them. The personal estate was distributed, in conformity with that view of the provisions of the will, by the executor.

By those provisions, Lucas E. Brandow was required by the testator to pay the legacy which was given to the consistory of the Reformed Dutch church, of Prattsville. The share of the testator's personal estate which was given by his will to his son Lucas E. Brandow exceeded the amount of that legacy; and it passed through the hands of Nicholas Brandow, the surviving executor of the will of John Brandow, in that capacity, and also as the administrator with the will annexed of Lucas E. Brandow.

The legatees, the consistory of the Reformed Dutch church of Prattsville, appealed from that portion of the surrogate's decree which adjudged that part of the will void providing for the payment of the legacy. And the General Term of the court reversed the part of the decree appealed from, holding the provisions valid which the testator had made for the payment of the legacy.

An action was afterward brought for the recovery of the

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legacy against the surviving executor, and on the 20th of August, 1868, the plaintiff therein recovered judgment against him for the sum of \$934.10, being the amount of the legacy, interest upon it, and \$140.50, the costs of the action. This judgment was assigned to the attorney of the executor on the 1st day of May, 1869, and the present action was commenced on the first day of the following month of July. The court at Special Term, before which the action was tried, ordered judgment in favor of the surviving executor, by which the legacy and the interest upon it, with one-seventh of the costs recovered by the judgment in favor of the legatee, was adjudged a charge upon the real estate which the testator devised to his son Lucas E. Brandow, and was then owned by the defendants, and ordered the same to be sold for the payment of the legacy, with interest and the costs of the suit. The defendants excepted to the decision and appealed to this court from the judgment entered upon it. During the pendency of the appeal, Nicholas Brandow died, and the present respondent was substituted in his place.

*Gilbert & Maynard*, for the appellants.

*Jas. B. Olney*, for the respondent.

Present—MILLER, P. J., DANFORTH and DANIELS, JJ.

DANIELS, J. At the time of his decease the testator left surviving him eight children, to whom he devised and bequeathed his real and personal estate. After devising his real estate, and providing for the payment of legacies by certain of the devisees, he made a disposition of his entire personal estate. First, he directed that all his debts, liabilities and funeral expenses should be paid out of it; and then that the rest and residue, not specifically devised and bequeathed, should be equally divided between his three daughters and four of his sons. The only portion of his personal estate previously affected by any provision contained in his will

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was that required to be used for the payment of his debts, liabilities and funeral expenses. None of it was in any manner specifically devised before the general division of it directed to be made among seven of his children, to whom it was given. The clause qualifying the disposition, by giving them all that was not specifically bequeathed or devised, was for that reason simply formal and ineffectual. He made, in effect, a gift of all the personal property he had to these seven children, after the payment of his debts, liabilities and funeral expenses.

Neither of the legacies given by the will was payable out of that portion of his estate. For they were neither his debts nor liabilities; and, besides that, they were all to be paid by his children to whom he devised specific portions of his real estate. These facts clearly evince it to have been the testator's purpose to exonerate his personal estate from the payment of the legacies given by the will. And, as to the one now in controversy, that design was further manifested by the requirement that one-half the amount of it should be paid by the devisee, who was to pay it in one year from the time of the testator's decease. This period would expire before the personal estate could, in the ordinary course of things, be distributed by the executor. For that reason, no part of it could be appropriated by the devisee to the payment of the first half of the legacy. From these circumstances it is quite apparent that the testator neither designed nor expected that any portion of the legacy should be charged upon his personal estate.

The fact that he made the annuity, provided for his wife, a lien upon the real estate devised to his three daughters and four of his sons, who were to pay it, does not of itself warrant the conclusion that he did not intend that the other legacies, which were to be paid, were not to become charges on the lands given to the devisees, who were directed and required to pay them. For if sufficient was manifested by the terms of the will to exhibit it to be his intention and expectation that the legacies were to be charged on the lands



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devised to the persons required to pay them, the charge would be created, although the testator had observed greater care and particularity in providing for the security of the annuity. (*Webb v. Webb*, cited in *Harris v. Fly*, 7 Paige, 426.) The circumstance that he expressly provided for the charge in one case, while he omitted to mention it in the other, would be sufficient to require the observance of great care and caution in the examination of the tenor, scope and terms of the will, for the purpose of determining whether he designed to discriminate between them in that respect or simply failed to be as guarded in the latter as he was in the previous portion of the will.

By the disposition which the testator made of his personal estate, it has been already shown that he could not have intended that the legacies should be paid out of that part of his property. That he did intend their payment, and that, too, by the persons mentioned by him, who were required to make the payment, is certainly free from all manner of doubt. The only contingency contemplated by the testator in that connection related to the legacy now in controversy. For, as to that, if the legatee could not take, hold and use it as he provided it should be taken, held and used, then the provision, so far as it was made for the particular legatee named, was to be void and of no effect. But the devisee, who was directed to pay it, was not to be the person solely benefited by its failure; for in that event it was to be equally divided between himself and the other children of the testator, to whom he gave his personal estate. The consideration of that contingency is no otherwise important in the disposition of this case than the indication which it affords that it was the testator's intention that the devisee, in any event, should be required to pay the legacy in substance, even if the legatee for whom it was designed could not take it. That amount he was required to pay because of the lands devised to him in the will.

The contingency itself has become altogether unimportant, since the court has held the legatee to be capable of taking and

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holding the legacy. All the defendants but Morss were actual parties to that adjudication, and therefore concluded by the determination. And as he acquired his interest in the lands from one of the parties to that proceeding while it was pending before the court, it would probably be equally as effectual as to him. For by taking his title in that manner he placed himself in legal privity with the person whose interest he purchased, and which was affected by the decision. By the purchase he substantially took the position of the person whose title was conveyed to him. And on that account the decision would be as equally effectual, as to him, as it otherwise would have been against the person whose interest was passed over to him. (*Custle v. Noyes*, 4 Kernan, 329; *Campbell v. Hall*, 16 N. Y., 575, 579.) But it is not very material to this controversy to determine whether that would be the case or not. For no reasonable ground can now exist as to the validity of the legacy which the testator provided should be paid to the consistory of the Reformed Dutch church, of Prattsville. That fact was settled in the other case, and the correctness of the decision is not questioned in this action.

The testator, in direct and positive terms, devised 160 acres of land to his son Lucas E. Brandow. He then afterward added the following explicit provision: "I hereby order, direct and require my son Lucas E. Brandow to pay to the executors hereinafter named the sum of \$500, which I have given to the consistory of the Reformed Dutch church, of Prattsville," "one-half payable one year from the date of my decease, and the other half in two years from the date of my decease, and when received by them as executors, I require them to pay it over to the consistory of the Reformed Dutch church, of Prattsville."

This positive direction, following the devise, evinces it to have been the purpose of the testator to impose the obligation it relates to as a qualification of his gift, and, by doing so, to give the legatee the amount mentioned out of the value of the property devised. He subsequently intended that the devisee should have the land reduced in value by the amount

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of the legacy. It was a part of the consideration on which the devisee was to receive and hold the land devised. By accepting the one he necessarily became liable to pay the other. The testator intended that the latter should issue out of or spring from the former. This purpose was exhibited with sufficient clearness, as the legacy was not to be paid out of any of the testator's other property, and was in part to be paid before his personal estate could be distributed, to render the legacy itself a charge upon the real estate devised. And that would be sufficient to sustain it as such, even though the testator was so careful as to provide by express words for the existence of such a charge in support of the annuity to his wife, and neglected to do the same to secure the payment of this legacy. For nothing less than that can be reasonably consistent with the positive direction with which he accompanied the devise.

The case in this respect is within what the chancellor appears to have regarded as a settled principle in courts of equity. And that is, that "Where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate, unless there is something in the will itself to indicate a contrary intention on the part of the testator." (*Harris v. Fly*, 7 Paige, 421, 425.) The same principle was held by the General Term of the third district in September, 1869, in the unreported case of *Grayson v. Russ*. It is also sustained by 2 Jarman on Wills (3 Am. ed., 525-528); *Godard v. Pomeroy* (36 Barb., 547); *Shulters v. Johnson* (38 id., 80); *Myers v. Eddy* (47 id., 263, 271); and *Reynolds v. Reynolds* (16 N. Y., 257) assumes and concedes its correctness.

This charge followed the land devised into the hands of the present owners, who are defendants in this action. Those of them who are the children of the devisee and received it under his will, beyond all question are affected by the charge; and the case is as equally clear as to the interest owned by the

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defendant Morss, for that was conveyed to him by one of the children of the person to whom the land was devised when the charge was made upon it. His title was derived through the will creating the charge, and that necessarily gave him notice of its existence. (*Cambridge Valley Bank v. Delano*, 48 N. Y., 326.) Besides that, as administrator of the effects of one of the devisees' children and guardian of others, he was a party to the decree made by the surrogate and the appeal taken from that portion of it relating to the validity of this legacy. And in those proceedings he must have acquired actual knowledge of all those portions of the will affecting the present controversy.

The fact that Nicholas Brandow, the surviving executor under John Brandow's will, might have paid the legacy out of the share of the personal estate bequeathed to Lucas E. Brandow, who was directed to pay it, or out of the assets which came into his hands as the administrator, with the will annexed, of the estate of Lucas E. Brandow, constitutes no defence to this action. For he did not do so; but distributed the entire personalty of both estates as he was required to do by the terms of the two wills, and conformably to the decrees made for that purpose by the surrogate. As no part of the personal property appertaining to those estates was misappropriated, or retained by the executor and administrator in his hands, but it was all administered by him pursuant to the directions of the surrogate, to which the defendants were parties, they are not in a condition to complain of his omission to pay the legacy out of those assets. He has not had anything which, by any possibility, could operate either as a counter-claim or payment.

That he did not retain sufficient assets in his hands to protect himself against an adverse result in the appeal from that part of the surrogate's decree which held the legacy void, was certainly injudicious upon his part. His omission to do so was an advantage to those who are now endeavoring to impose the responsibility of paying the legacy upon his estate. For, by means of it, they have received that amount

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beyond what they were entitled to demand from him; and a reasonable reciprocation of his fair dealing and generosity would have prompted them voluntarily to return that portion of the assets to him which was necessary to enable him to discharge the obligation he had subjected himself to on their behalf for the payment of this legacy.

The distribution of the entire assets of both estates probably resulted from the erroneous decision made by the surrogate, which was corrected on the appeal taken from his decree. As that left the legacy unpaid, and the executor with no means to pay it, under no possible view could it have the effect of defeating the recovery of the amount from the property especially charged with its payment. The defendants, of all other persons, were not injured; and, by payment of the amount recovered, they will only pay what the property in their hands was legally charged with by the directions of the person whose bounty they are still enjoying.

When the land devised was accepted under the will by Lucas E. Brandow, the devisee, he became personally liable for the payment of the legacy he was directed to pay on account of it. (*Dodge v. Manning*, 1 Com., 298, 301; *Larkin v. Mann*, 53 Barb., 267.) And as such a liability may, under ordinary circumstances, be enforced by what is known as an action at law, the statute of limitations has been relied upon as a defence in the present suit because it was not commenced within six years after the right of action accrued. If Lucas E. Brandow had lived, that point would have been presented by the case; but as he died the next month after his father, and when the letters testamentary were issued to the executor, letters of administration were also issued to him, with the will annexed, as administrator of the estate of the person who was to pay the legacy; that put it out of his power, as executor, to maintain such an action. After that, the only action the executor could maintain for the recovery of the legacy was an action in equity; and, as the present suit was commenced within ten years after the cause of action accrued, it was brought in time to save the statute. (*Rundle*

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v. *Allison*, 34 N. Y., 180.) That would, probably, be the case, even if the circumstance just mentioned had not appeared. For, to recover the legacy as a charge upon the defendant's land, would have been an action for relief within section 97 of the Code of Procedure; as it would be for relief not previously provided for in the chapter containing that provision. That is the only section defining the time within which such an action should be commenced, and that allows it to be done at any time within ten years after the cause of action shall have accrued.

The section of the Revised Statutes (2 R. S., 228, § 49) which required suits to be brought in equity within the same time they were limited to at law, where the jurisdiction was concurrent, was repealed by the Code (Laws of 1848, 511, §§ 66, 68) as to all cases where the cause of action afterward arose; and it never was afterward re-enacted by the limitations prescribed by the Code. In fact, it was inappropriate to the new system, under which all actions were to be prosecuted in the same form and before the same tribunals, whether they were to enforce legal or equitable rights. For that reason it became necessary that changes should be made in the provisions of the statutes concerning the time limited for their commencement. And in those changes the provision relating to concurrent jurisdictions was omitted, and that prescribing the time in which actions for relief could be brought was retained and re-enacted (2 R. S., 513, § 77), subject to the single exception, including certain actions for relief on account of fraud. (Code, § 91, sub. 6, § 97.) So that, with that exception, actions for specific relief in equity are now to be brought within ten years. The cases of *Borst v. Corey* (15 N. Y., 505) and *Bruce v. Tilson* (25 N. Y., 194) contain nothing in conflict with this change in the statute, for in each of them the cause of action arose before the Code, and for that reason they were governed by the law previously in force. In *Rundle v. Allison* (*supra*) the change made in this respect seems to have been overlooked, while the decision actually made by the court was in har-

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mony with it. The apparent incongruity arises out of the circumstance that much of the reasoning contained in the opinion proceeded upon the assumption that the previous statute relating to concurrent actions in law and equity still remained in force. But even under that authority the present action was commenced in time.

The executor had the right to bring the action, for, by the terms of the will, the legacy was to be paid to him, and by him paid over to the legatee. There was nothing unjust or inequitable in charging the defendants with one-seventh of the costs recovered by the legatee against the executor. It was on account of their default in payment that he was rendered liable to the action.

No defence can be predicated on the circumstance that the judgment recovered by the legatee was purchased by and assigned to the attorney of the executor. Even if the latter had actually paid it, he would still have been entitled to maintain the present suit for the purpose of securing his own indemnity. For that purpose he would have been entitled to be subrogated to the rights of the legatee. Whether the attorney shall be permitted to enforce the entire judgment against the estate of his client, is a matter with which the defendants have nothing to do, for nothing has been shown impeaching his rights in any respect; for anything now appearing he may be at liberty to do so.

The judgment directed by the Special Term was right and it should be affirmed, with costs.

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Campbell v. Tate.

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**MARGARET CAMPBELL v. MICHAEL TATE.**

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

Parol evidence that one of two joint makers of a note signed as surety is not competent.

THE action was brought to recover the amount due upon a promissory note made by defendants for the sum of \$300. The defendant, Shearer, interposed no defence, and the defendant, Tate, defended as stated in the opinion.

The cause was tried at the Delaware County Circuit, in January, 1871, before Justice Boardman and a jury. The justice excluded the defence, as is also stated in the opinion, and directed a verdict in favor of the plaintiff for \$354.72, the amount of the note and interest. Exceptions were taken by the defendants' counsel to the rulings of the justice, and a list of exceptions was made and settled, which were directed to be first heard at General Term with a stay of the plaintiff's proceedings.

*R. W. Peckham, Jr.*, for the plaintiff.

*N. C. Moak*, for the defendant.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. This was an action against the defendants as makers of a promissory note. The defendant, Tate, alone appeared and set up as a defence that he signed the note as surety, and that this was known to the plaintiff, who neglected and refused to collect the note of the principal debtor while he was solvent, although requested to do so by the defendant; and that such principal debtor had become insolvent and had left the State. The judge upon the trial held that the answer contained no defence, and excluded evidence offered to prove the facts therein contained.

The question really involved in the case is, whether parol evidence is admissible to establish that the defendant Tate



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was, in fact, a surety of Shearer, and thus change the legal effect of the instrument upon its face.

The general principle that parol evidence is inadmissible to vary the terms of a written contract is too well established to admit of any question ; and, after a careful examination, I am entirely satisfied that the case at bar is not brought within any exception to this salutary rule.

None of the cases to which we have been referred by the defendant's counsel establish the proposition contended for. In *Artcher v. Douglass* (5 Denio, 509) parol evidence was admitted to prove that the defendants executed a bond to indemnify the sheriff for seizing certain property on an attachment issued upon the application of V., in order to let in a defence arising out of their situation as sureties, that is, that the plaintiff had settled and released the principal. The learned judge who wrote the opinion concedes that the authorities are conflicting upon the question whether, in case of joint obligation or agreement which is silent as to the character of the parties, the surety can be allowed to show, at law, that he executed the obligation or entered into the agreement in that character ; and the authorities which are cited to establish that parol proof is competent, do not, so far as I have been able to examine them, sustain such a doctrine. The decision of the court is put upon the ground entirely that the case was not a joint contract of principal and sureties, but one executed by sureties alone. *Niemcewicz v. Gahn* (3 Paige, 614) decides that where the wife unites with her husband in a mortgage of her real estate, merely as security for the payment of his debt, she is entitled to have his interest, as a tenant by the curtesy, first sold and applied to the payment of the debt, and where the fact that she executed the mortgage as surety does not appear, it may be established by parol proof.

There was also a cross bill in this case filed by the wife against the husband and the complainant in the original cause, and the principle decided was appropriate in disposing of all the equitable rights of the parties, and does not, I

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think, bear upon the facts presented in an action upon a joint and several promissory note, where it does not appear from the instrument itself that either of the makers signed as sureties.

*Lafarge v. Herter* (9 N. Y., 241) has no bearing upon the question now considered.

In *Barry v. Ransom* (12 N. Y., 462) the question was as to the admission of parol evidence of an agreement among sureties in settling their liabilities as between themselves, and it has no application.

In *Chester v. The Kingston Bank* (16 N. Y., 336), in an equitable action parol evidence was held to be competent to show that a bond for the payment of money, absolute in its terms, was delivered under an agreement by which it was to be held by the obligee *as collateral* to a debt of third parties, and to be canceled upon his obtaining payment from them. It was said by COMSTOCK, J., that "such evidence is not regarded as contradicting the written undertaking, but as tending to show that it has been paid and discharged by another person bound for the same debt." At page 343, PAIGE, J., says: "Parol evidence is admissible to show that one of several joint makers of a bond or note signed it as surety; although there is nothing indicating it on the face of the instrument," citing 2 C. & H.'s Notes, 1465 and 1466, as authority. This doctrine is stated to be applicable to many cases; but the cases cited to sustain it do not all uphold such a principle, although it is stated that this was adjudged in New Hampshire (4 N. H., 221). It is also said that the English decisions are in conflict on the subject, and the balance of authority there is against the doctrine.

It will be noticed that none of the cases considered decide the point presented, and we are, therefore, left to fall back upon the general principle that parol evidence is not admissible to contradict a written instrument; and such cases as uphold the doctrine that the obligation of makers of a promissory note, under ordinary circumstances, cannot be affected by parol proof.

The general doctrine appears to be established, beyond any

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question, that, as between makers of a promissory note and the holder, all are principals and equally liable; but, as between themselves, their rights depend upon other questions which are the proper subjects of parol evidence. (*Robison v. Lyle*, 10 Barb., 512; *Spies v. Gilmore*, 1 Coms., 321; *Brown v. Curtiss*, 2 id., 225.) In the last case cited, BRONSON, J., remarks: "If the parties have made a mistake in drawing up their contract, the instrument may be reformed in equity by a direct proceeding for that purpose. But the courts can have no right, under color of construing the agreement, to say that it means something else from what the language of the instrument plainly imports."

The cases are almost innumerable which hold that promissory notes and bills of exchange cannot be varied, modified or changed by oral testimony. (See *Thompson v. Ketcham*, 8 Johns., 190; *Fitzhugh v. Runyan*, id., 375; *Erwin v. Saunders*, 1 Cow., 249; *Payne v. Ladue*, 1 Hill, 116; *Pratt v. Gulick*, 13 Barb., 301.) It is entirely safe to stand by this established rule; and as the judge committed no error, the verdict must stand. No other question demands discussion. A new trial is denied and judgment ordered for plaintiff on the verdict, with costs.

PARKER, J., concurred.

POTTER, J., expressed no opinion.

Judgment for plaintiff.

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DANIEL A. STEWART et al., Respondents, v. LEVI MILLARD,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

The defendant drew a draft or order in plaintiff's favor (not negotiable), which, if accepted and paid, was to pay a balance of an account. There was an account between the defendant and the drawee, which they afterward settled, but the balance was in the drawee's favor, and no allowance was made for the draft. *Held*, that the defendant was not discharged by the plaintiff's failure to present the draft and give notice of non-payment.

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APPEAL from a judgment of affirmance in the County Court of Fulton county.

The action was brought on an account, before a justice of the peace, and the defence was payment by an order or draft given by the defendant on L. R. Fox. The order was not produced and its terms were not proved. The facts are stated in the opinion.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. The action was brought before a justice of the peace of Fulton county to recover an account. The defence was that the account was paid by a draft or order made by the defendant upon one Fox. The plaintiff and the defendant had a settlement on the 1st of December, 1866, when the order was made. It was taken upon the condition that it should be accepted and paid. The plaintiff presented it to Fox, who said if the defendant had it coming to him in January or when they settled, that he would pay it. One of the plaintiffs testifies that he thinks he notified the defendant of its non-payment the same winter, although not positive of it. Fox testifies that he did not owe the defendant, and when he and the defendant looked over their accounts, a balance was due from the defendant to him; that at the time of the settlement the order was mentioned, but was not charged or allowed to the defendant, or the amount paid to the plaintiffs.

There was some contradiction in the testimony, but assuming that the disputed facts were found in favor of the plaintiff, the foregoing are all which are material.

The justice rendered a judgment in favor of the plaintiff for the amount of the plaintiff's claim, \$27.43, besides costs, and the defendant appealed to the county court, where the judgment was affirmed, and the defendant now appeals to this court.

The only question which arises in this case is whether

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notice of non-acceptance or non-payment to the defendant was necessary.

It is a general rule that a failure by the holder to give to the drawer or indorser notice of the non-acceptance or non-payment of a draft, will discharge them from liability. (Ed. on Bills, 445.)

The mere fact that the drawer has no funds or effects in the hands of the drawee, is not alone sufficient to excuse the want of notice, if it appears that the drawer had a reasonable expectation that his bill would be accepted and paid. (*Robinson v. Ames*, 20 J. R., 150; 4 Cranch R., 141.) Even when there are dealings between the parties, and there is a fluctuating balance between them, or the drawer has from any cause reason to believe that he has at the time or will have funds in the hands of the drawee when the bill becomes due, he is entitled to notice, and, *a fortiori*, he is entitled to have the bill duly presented. (Ed. on Bills, 450.)

Damages will be presumed from a want of notice, but the presumption is not conclusive. If it appear, however, that no damage could arise, the necessity for the presentment or notice does not exist. (*Commercial Bank v. Hughes*, 17 Wend., 91; Ed. on Bills, 449, 450.)

As there was an account existing between the defendant and Fox, perhaps the defendant was authorized to draw the draft in question, but as no injury resulted to the defendant by a failure to give notice, I think notice was not necessary. The proof as to the terms upon which Fox and the defendant settled is conflicting; but the finding of the court in this question of fact is conclusive. It must, therefore, be assumed, I think, that the defendant settled with Fox without his allowing the draft to the defendant. The defendant, therefore, suffered no loss or injury in consequence of the neglect to give him notice (*Lovett v. Cornwall*, 6 Wend., 376, 377; *S. B. and N. Y. R. R. Co. v. Collins*, 3 Lansing, 32; *Bradford v. Fox*, 38 N. Y., 289), and cannot avail himself of such omission. As this distinctly appears from the facts presented, there was no defence to the action.

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I do not understand that any of the cases cited hold that notice is indispensable, and the drawer will be discharged whether he has suffered injury or not.

The judgment of the Justice and County Court must be affirmed, with costs.

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JOSEPH THOMSON, Respondent, v. EDWIN WILCOX and others,  
Appellants.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1873.)

When the description in a mortgage of real estate, situated in a city, correctly gives the street number of the lot intended to be mortgaged, but by metes and bounds describes an adjoining lot, subsequent purchasers of the lot designated by the street number, having constructive notice of the mortgage, may rely upon the description by metes and bounds as being the correct one of the premises conveyed, and are not charged with notice sufficient to put them upon inquiry, as to the property intended, by the fact that the street number is correctly stated.

APPEAL by defendants from a judgment in an action of foreclosure, entered upon the decision of a justice of this court, at Special Term. The facts are stated in the opinion.

Present—INGRAHAM, P. J.; BRADY and LEARNED, JJ.

INGRAHAM, P. J. The plaintiff was the holder of a mortgage on a lot fronting on Twenty-third street, on which a dwelling-house had been erected. This mortgage described the property as commencing at a point distant about seventy-five feet from the south-easterly corner of Twenty-third street and Fourth avenue, running along the southerly side of Twenty-third street in an easterly direction twenty-five feet, etc. The appellants, Wilcox and Phillips, each held a mortgage on a house and lot on the southerly side of Twenty-third street, distant fifty feet, more or less, from the corner formed by Twenty-third street and Fourth avenue, and running thence easterly twenty-five feet, etc. According to these

boundaries the lots mortgaged were adjoining to each other. Both of the mortgages further described the property as known as No. 104 East Twenty-third street. That number was the proper number for the lot mortgaged to the defendants. The plaintiff proved that the loan was made on the house number 104, the third house from the Fourth avenue, but there is no proof that any mistake was made in drawing the mortgage except what is to be inferred from the number stated to be 104 in all the mortgages.

The plaintiff's mortgage was recorded 27th April, 1870. The mortgage to Wilcox was recorded January 11, 1871, and the mortgage to Wilcox, which was assigned to Phillips, was recorded 31st January, 1871.

The plaintiff brought this action, alleging that his mortgage was intended to cover the lot fifty feet east of Fourth avenue, and praying to have the mortgage foreclosed on the lot fifty feet east of the Fourth avenue, and the premises sold to pay the same.

The judge, at Special Term, made a judgment directing the sale of the lot fifty feet east of Fourth avenue, and the payment of the plaintiff's mortgage out of the proceeds prior to the mortgages held by the defendants.

The question in this case is whether the house and lot number, or the description of the lot by distances and boundaries shall control, and whether the lot number in the boundaries was sufficient notice to the defendants of the plaintiff's mortgage.

It is well settled law that when there is a mistake in the description of the property conveyed, that preference is to be given to fixed and known monuments and boundaries in the deed, as indicating and identifying the premises, and parol evidence is not admissible except to explain latent ambiguities, or the terms used therein not commonly understood. In consequence of this rule natural and permanent objects referred to in the deed control courses and distances. (*Hall v. Davis*, 26 N. Y., 569; *Mackentile v. Saur*, 17 St. R., 104.)

In new countries the order of applying boundaries is, first,

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to natural objects; second, to marks made for a boundary; and third, to courses and distances. (*Bolton v. Lake*, 16 Texas, 96; *Ferris v. Coover*, 10 Cal., 629.)

But courses and distances can only be controlled by monuments, natural or artificial. (*Chadbourne v. Mason*, 48 N. C., 391.)

In *Jackson v. Loomis* (18 John., 81), where a lot was described by a wrong number and correct courses and distances, the court held that the number should be disregarded and the courses and distances should govern. That where the number and the courses and distances differed the courses and distances should govern.

The Ch. J. says: "The lot may have obtained its number from reputation only, and in point of certainty holds no comparison with the monuments." It is proper, however, to say that in that case the error was in the number which was rejected. In the same case in Court of Errors (19 Johns., 449), the same rule was affirmed, rejecting the number in favor of the courses and distances. The Chancellor said: "The land is sufficiently described by the metes and bounds, courses and distances, etc., and the number of the lot may safely be rejected."

In *Jackson v. Wilkinson* (17 John., 146), the premises were described as commencing at a given point, and it was held that such should control as the starting point of the survey. The court decided that "the boundary given must be followed. The case (it is said) concedes the place of beginning as fixed and certain, and the line must be run from that point."

In that case the court also say: "We are ignorant of any principle on which the boundaries of a deed can be rejected, when they are susceptible of a definite and certain location, on the ground that the grantor did not own part of the land conveyed, but did own contiguous land."

In *Lush v. Druse* (4 Wend., 313), the number of the lot and patent was held sufficient, but in that case there had been a possession under the conveyance for a long period, and that



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was a case between landlord and tenant for rent, where a different rule would control.

In *Jones v. Holstein* (47 Barb., 311), the land described in the deed was part of lot twenty-one, and was there described by metes and bounds, which extended the land beyond the lot twenty-one, and it was held that the boundaries controlled and not the number.

There are other cases which might be cited to the same purport, viz., that as between the number of the lot and the boundaries of a more permanent character, the former must give way to the latter, and if this is a fixed and undoubted point to commence at, the lines must be run from that point.

These cases are referred to for that purpose only, and it must be conceded that in most of them the lot was incorrectly numbered, and in that respect differed from the present case.

That as between mortgagor and mortgagee the facts might have been sufficient to have the mortgage reformed, may be conceded. This action, however, is not between those parties, but between mortgagees each claiming priority for his own mortgage, and the main question is whether the plaintiff's mortgage was sufficient notice to the defendants to put them on inquiry.

It cannot be denied that the boundaries in the plaintiff's mortgage were entirely beyond the lot mortgaged to the defendants. The place of beginning and all the courses and distances therein laid down were correct as the boundary of the adjoining lot. As such it was regarded both by the defendants and the register in making his search. It would not be pretended that without the number of the house and lot, the plaintiff could have any claim superior to that of the defendants. Did the addition to the boundaries that the premises were known as lot No. 104 act as such notice?

This was the correct number of the premises mortgaged to the defendants. It does not appear that they had any actual knowledge of this fact, but the contrary may be presumed, because the register, when required to search, did not return

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the plaintiff's mortgage as on the property, although the search also contained the number of the house and lot.

In *Williamson v. Brown* (15 N. Y., 354), the rule as to notice is thus given: "When a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some title in conflict with that he is about to purchase, he is presumed to have made inquiry, or to have been guilty of negligence fatal to his claim to be considered a *bona fide* purchaser. This presumption may be repelled by proof that the purchaser failed to discover the prior right after due diligence."

I do not think the mere insertion of the number of the lot was any sufficient notice. The lot was particularly described by boundaries which placed it beyond the lot mortgaged to the defendants.

With such boundaries, even if the defendants had actual notice of the number inserted in the plaintiff's mortgage, it would have been sufficient diligence on their part to have assured themselves that the courses and distances described a lot entirely different from that claimed by them, and they would have been warranted in concluding such number erroneous and in yielding to the superior credit to which the courses and distances were entitled in the description of the premises.

Besides, there is another reason operating against the plaintiff's claim. He is the party who has been guilty of the error; and where one of two innocent parties must suffer, it is but just that the loss should fall on the party who commits the error.

The defendants have acted without fault, while the plaintiff has made the error, and as he has not done enough to give the defendants notice, he must bear the consequences of his error.

So much of the judgment as directs the payment of the amount due on the plaintiff's mortgage should be reversed, and the judgment should direct the payment of the mortgages held by the defendants out of the proceeds, with their costs, and to pay the balance to plaintiff on account of his mortgage.

Ordered accordingly.

ARCHIBALD S. GREEN, Respondent, v. ABRAHAM C. DISBROW,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

The plaintiff proved a book account charged against A., but the credit was intended to be given to B., and the charge so made at his request and for his convenience. *Held*, that the undertaking of B. was not collateral, but the credit was wholly to him.

A. lived on B.'s farm, which was carried on for B.'s benefit and under his control. No specified compensation was paid to A. for services performed and hands boarded by him. A. at different times delivered butter and eggs to the plaintiff, at B.'s suggestion that they should be so delivered to apply on the account; and the value of the articles was so applied. B. saw the account and did not object, and afterward promised to pay it. The butter was from milk of cows, and the eggs were from fowls owned by A. and B. together, but kept on the farm, and used in common.

*Held*, that the articles were delivered for the account of B.

*Held*, also, that the articles were not to be regarded as having been delivered in part payment of the account, but as items of a mutual, open and current account, where there have been reciprocal demands.

Books of original entry, and also books of entries transcribed from lost books of original entry, are admissible in evidence as memoranda of witnesses who testify to delivery of the items of the account.

A bill of items, proved to have been copied from the entries, is admissible, at least, to show what charges were actually made.

Charges in books and accounts, proved by the plaintiff and his clerks, are competent, although other items in the same account are not proved.

*Held*, also, in an action on the account against B., that the plaintiff might prove that A. had no property, as bearing upon the improbability that plaintiff would give him credit for any large amount.

The contents of a letter from plaintiff to A., applying for payment of the account, which appeared from A.'s cross-examination to have been received, and as to which he then swore he did not know where it was, but thought it had been destroyed,—*Held*, admissible on re-direct examination.

*Held*, also, that testimony to show that B. had paid A.'s similar debts was proper on the question of A.'s agency in contracting the account.

And that plaintiff's custom as to charging interest, communicated to B., and on which he had acted, was also admissible.

But *held*, also—the demand being almost outlawed and disputed, the circumstances peculiar, and the evidence failing to fix the time when the custom was communicated to B., or in what manner he had conformed to the custom, or how the account was made up, with regard to charges for interest—that interest, before the suit, was improperly allowed.

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THE action was brought to recover the amount of an account for goods alleged to have been sold by the plaintiff to the defendant. The plaintiff was a merchant, and the account accrued between November, 1855, and November, 1863. The account was charged directly to the defendant's son, as was claimed, by the special direction of the defendant, and by reason of his promise to pay for the goods furnished. The defendant claimed that he was not liable, because the goods were delivered to his son, and the credit given to him and not to the defendant, and that the claim was barred by the statute of limitations. The cause was referred. The testimony was conflicting as to the material facts, and the referee reported in favor of the plaintiff for the amount of the demand. The report was as follows, viz. :

"That between the 6th day of November, 1855, and the 12th day of November, 1863, and at the times set forth in the bill of particulars herein, the plaintiff delivered to one Jonathan W. Disbrow, goods, wares and merchandise of the amount and value set forth in said bill of particulars; that the same were sold and delivered at the special instance and request of the defendant, and upon his sole credit, and upon his express promise to pay therefor; that said goods, wares and merchandise were sold on credit, and were charged in account upon the plaintiff's books; that they were charged in said account to said Jonathan W. Disbrow, at the special instance and request of the defendant; that during the same time and at the times set forth in said bill of particulars, the said Jonathan W. Disbrow, at the request of the defendant, delivered to the plaintiff sundry quantities of butter and eggs to be applied on said account, and the same were thereupon credited on said account by the plaintiff; that it was the custom of the plaintiff to charge interest on such accounts after six months from the time of the sale and delivery of the several articles therein charged, which custom was known to the defendant.

That the last item charged on said account was delivered and charged, as aforesaid, on the 11th day of November.

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1863, and the last item delivered and credited thereon was delivered and credited, as aforesaid, on the 20th day of August, 1862, and that this action was commenced on the 23d day of June, 1869.

And as conclusions of law I find that said items so charged and credited constitute an open, current and mutual account and reciprocal demands between the plaintiff and defendant.

That no part of the plaintiff's demand is barred by the statute of limitations.

That the plaintiff is entitled to interest upon each item of said account after six months from the delivery thereof, after deducting from the amount of said account the value of said butter and eggs, and other things credited thereon.

That the balance due from the defendant to the plaintiff upon said account, on the 11th day of November, 1863, was \$979.12; which sum, together with interest thereon from that date, less the interest for six months on thirty-seven dollars and forty-five cents, and amounting in all, to this date, to the sum of \$1,521.46, the plaintiff is entitled to recover of the defendant herein, besides costs."

He also made additional findings as follows, viz.:

1. That the first item in the account upon which this action was brought was for goods delivered to Jonathan W. Disbrow on the 6th day of November, 1855.

2. That the only promise or request proved to have been made by defendant was sworn by plaintiff to have been made, and was made, before the 6th day of November, 1855, and was, in substance, as follows: Defendant requested plaintiff to keep Jonathan's account separate for convenience, so that they wouldn't have to go all over the books and examine the items; that he expected to settle the account the same as though charged directly to him. But, in addition to this express declaration, I find the following facts, viz.:

*First.* That, before the opening of the account in suit, Jonathan Disbrow had frequently procured goods at the plaintiff's store on his father's credit, which were charged to the defendant and paid for by him without any notice forbid

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ding him, the plaintiff, from allowing Jonathan to obtain other goods.

*Second.* That the defendant frequently saw the plaintiff's account for the goods in question, from November, 1855, to November, 1863, in this suit, and made no objection thereto.

*Third.* That on the 12th of January, 1858, when the defendant settled with the plaintiff for the goods which had been charged to the defendant in his own name, he paid to the plaintiff, upon the account in this suit, fifty dollars cash.

*Fourth.* That, when the amount in suit had run up to about \$800, the plaintiff had a conversation with defendant concerning the account, when, at the close thereof, the defendant said, in substance: "Well, well, what they have at one time they cannot have at another."

*Fifth.* That the articles charged in the account in suit were had by Jonathan Disbrow, and used upon the farm of the defendant, which was managed upon the following terms: On the marriage of Jonathan, his father told him to go into the house on the farm, and he did so, and kept house there, having no charge or control, but working on the farm, which was conducted for his father's benefit, and his father had the proceeds thereof. There was no agreement as to Jonathan's compensation. He boarded the men who worked on the farm for his father without charge. When his father had groceries on hand in his own house, such as sugar, tea and coffee, Jonathan received them from his father without being weighed, measured or charged, and used them upon the farm; and at other times Jonathan and his family obtained groceries from the plaintiff's store.

On some occasions, Jonathan's wife consulted with the defendant's wife, in the defendant's presence and hearing, as to obtaining goods for dresses, and received express permission; and on other occasions defendant told Jonathan to send to the plaintiff's for articles that were wanted during the harvesting season.

3. That, after such request, plaintiff never applied to

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defendant, for payment of the account charged to Jonathan, until after the date of the last item on said account.

4. That, when plaintiff did so apply to defendant for payment, defendant refused to pay said amount, and said, in substance: "Good God! you do not expect me to pay that account; it would ruin me. I told you long ago that I did not expect to pay."

5. That, while said account was running, plaintiff also had a separate account charged to defendant individually, which was in no way connected with the account in question, and which was paid in full before the commencement of this action.

6. That no written promise or agreement was made or subscribed by defendant to pay the account mentioned in said report, or any part thereof.

7. That the butter and eggs, referred to in referee's report as delivered to plaintiff by Jonathan W. Disbrow, were produced from cows and hens which were kept upon the farm, some belonging to Jonathan and some to the defendant, but they were not separately kept, but were used as required both in the family of defendant and that of Jonathan.

8. That no charge or claim was ever made, either by defendant or said Jonathan W. Disbrow, against the plaintiff for said butter and eggs, or any portion thereof, except that after they had been delivered to the plaintiff, and were credited in the account upon his books, the defendant saw the amount of the credits, and what they were for, upon the books and made no objection.

9. That the only request proved to have been made by defendant, relative to the delivering to plaintiff of said butter and eggs, was a statement to his son Jonathan's wife to keep all the eggs and butter they wanted, and if they had more, send them to Green's as well as anywhere, as it made no difference to him where they went; and one night the defendant's wife said to her in defendant's presence, when informed that they had more eggs and butter than they wanted to use, that they had better take them to Archie's and let them be applied on the account.

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10. That no payment was made on said account within six years next before the commencement of the action. But there was no agreement between the parties, that the butter and eggs should be received as a payment on account, nor any other agreement relating to them, except an implied agreement that they should be sold and delivered at their market value, and they were credited in account at such value.

11. That there was no proof of any written acknowledgment of indebtedness or promise by defendant to pay said account, or any part thereof, within six years before the commencement of this action.

12. That of said account all the items accrued before June 23d, 1863, except items amounting in all to the sum of (\$104.29) one hundred and four dollars and twenty-nine cents. It had always been the uniform custom of the plaintiff to charge interest on all his accounts, except cash charges, such as flour, after six months, and this custom was known to the defendant when the account was contracted. That Jonathan had no property, and the sole credit for the account in question was given by the plaintiff to the defendant, and the account was kept in the name of Jonathan at the request of the defendant, and for his convenience.

Exceptions were duly taken to the referee's report.

The plaintiff's accounts were kept in this manner: The original entries were made in a blotter, then transcribed to a day-book and posted into a ledger, which gave the page and amount of the entry on the day-book, except that sometimes in giving a credit it was entered at once upon the ledger. The plaintiff produced on the trial all the books of original entries of the account, except one or two of the earliest, which were lost or destroyed. He produced the day-books containing transcripts of all the entries in the lost blotters and all the ledgers. All the entries in the lost blotters were made either by the plaintiff or his clerk. The transfers from the lost blotters to the day-books were made by the plaintiff. On an exhibit, being bill of items, the plaintiff (having looked over all the entries of defendant's account in his books) had



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entered certain marks on the margin, showing which were transferred by himself, which by his clerk, which were sold by and entered by him in the blotters, and so of the other clerks. Each clerk who had been in plaintiff's service, and also the plaintiff, testified that all the entries made on the blotters of this account were made from day to day in the usual course of business, and were believed to be correct, and were so intended.

The referee admitted the original entries in the blotters, and also so much of the transcripts as were made from the lost blotters; also the exhibit marked in the margin as above stated.

Questions were made upon the trial as to the admissibility of evidence, and exceptions taken, which are stated in the opinion.

A motion also was made for a nonsuit and denied, to which decision exceptions were also taken.

Judgment was entered for the amount paid, by the referee, and costs, and the defendant appealed.

*Matthew Hale*, for the defendant and appellant.

*L. Tremain*, for the plaintiff and respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. It is insisted by the defendant's counsel that the evidence introduced upon the trial of this action does not warrant the conclusion, at which the referee arrived, that the goods delivered to Jonathan W. Disbrow, the defendant's son, were delivered at the special instance and request of the defendant, and upon his sole credit and his express promise to pay for the same.

There was evidence upon the trial to prove that the defendant originally, in 1851, told his son to go to the plaintiff's store and procure what articles he required, and when he settled his own bill the defendant would settle that. This

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was communicated to the plaintiff, the articles charged in the account to the defendant, marked for the son; and defendant, in 1852, requested the plaintiff to keep the account separate for convenience, so that he would not be obliged to go all over the books and examine the items, stating that he expected to settle the account the same as if they were charged directly to him. The charges were then made to the son, and the defendant settled accounts, kept in that way, twice, once on the 4th of April, 1853, and again on the 31st of October, 1855; and on the 12th of January, 1858, there is evidence to show that the defendant made a payment of fifty dollars upon the account in question. He saw the books containing the account against his son frequently between November, 1855, and 1863, and when the account run up to \$800 the defendant looked it over, said it was large, and that what they, referring to his son and family, had at one time they could not have at another.

During the whole period, while the account was accruing, the son lived on his father's farm, which was carried on for the benefit and under the control of the defendant. There was also testimony that for fourteen years, while the son worked the farm, he received no specified amount for his services. He boarded the hands without charge. The wages of the hired girl were paid by his father, who furnished groceries of his own without their being measured or weighed, directed others to be purchased of plaintiff, and the proceeds of the farm were turned over to the defendant. There is also evidence of the declarations of the defendant recognizing the claim of the plaintiff. True, the testimony is conflicting on most of the material facts, and it is a strong circumstance against the validity of the plaintiff's claim against the defendant that it was charged upon the books to the son, and was allowed to remain until nearly barred by the statute of limitations before any suit was brought. These were matters, however, for the consideration of the referee; and as it is not  
• entirely apparent that his conclusion is entirely adverse to the

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weight of the evidence, it should not, be disturbed in this respect, unless some legal rule has been violated.

I am inclined to think that this has not been done, and that there was sufficient evidence to warrant the finding that there was not only a request by the defendant to the plaintiff to deliver the goods, but a promise to pay, kept alive and continued by acts and declarations, as well as by circumstances, showing that the son was merely a servant of the defendant, and that the goods were really furnished for the benefit of the latter.

Although the fact that the goods were charged directly to the son upon the plaintiff's books, unexplained, establishes that the *sole credit* was not given to the defendant, the accompanying explanation that this was done at the defendant's request, as a matter of convenience, and to distinguish the account from the articles delivered to the defendant personally, rebuts any presumption arising from the manner in which the charges were made.

The whole credit, therefore, according to the finding of the referee, which is, I think, warranted by the facts, was given to the defendant and not to his son, and the promise made was direct and not collateral to any liability of the son. In fact, it would be clearly erroneous to allow a party who had induced a merchant to keep an account in the name of another, in order to distinguish it as a separate matter, to claim, in the face of proof showing that such was the case, that the undertaking to pay was collateral. It is always competent to explain acts of this character, and, when satisfactorily done, there is no reason why they should bear a different interpretation from what is authorized by the evidence.

It is further claimed that all of the items of the account which accrued prior to June 23, 1863, are barred by the statute of limitations.

This depends upon the fact whether there was an open current and mutual account and reciprocal demands between the parties. There are credits on several occasions in 1858,

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1860, 1861 and 1862, for butter and eggs delivered by defendant's son to the plaintiff, amounting in all to between twelve and thirteen dollars; the last credits in 1862, on the tenth and thirteenth of June and the twentieth of August amounting to two dollars and fifty-nine cents.

In regard to these credits the wife of the defendant's son testifies to a conversation in which the defendant stated that if they had more eggs and butter than they wanted that they should send them to the plaintiff and let him apply them upon the account.

There is evidence to show that the defendant saw the credits on the books, and asked what they were, and, upon being told, made no objection, thus indirectly assenting to what had been done. Afterward, as we have seen, if the testimony is to be believed on that point, he promised to pay the account.

There is evidence to show that one of the cows was given to the wife of the defendant's son by her father, and the other the father pointed out and told the son he could have; that the defendant bought about a dozen fowls and put them on the farm, and the rest were furnished by the son, there being generally thirty or forty there. The son sold some twenty-six of the fowls at one time. Jonathan's wife testifies that the fowls belonged to the farm and to the defendant. The exact time is not stated when the arrangement was made as to these different articles of property, and it may be assumed, I think, that it was at or about the time when the son took possession of the farm in 1851. The manner in which the business of the farm was conducted by the son, as the agent of and for the benefit of the defendant, without recognizing the right of any one but the defendant, as the owner of any portion of the property, as well as the assent of the defendant to these credits upon the books, all tend to establish that the articles were considered and delivered as the property and with the assent and approbation of the defendant.

Nor do I think the delivery of these articles, under the cir-

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cumstances, can be considered as a payment upon the account. They constituted a delivery of goods in the usual and customary manner, where two parties have mutual dealings, and a current account exists between them. If it were otherwise, then every delivery of goods would constitute a payment, and mutual accounts could scarcely be proved and established under any circumstances. One item of credit alone is held to make the account mutual, and take the case out of the statute. (*Penniman v. Rotch*, 3 Metc., 216; see also *Kimball v. Brown*, 7 Wend, 322; *Norton v. Laus*, 30 Cal. 126; Code, § 95.) The authorities relied upon by the defendant do not, I think, sustain the position contended for or controvert the views expressed.

The bill of items of the accounts was competent as a copy of memoranda showing what charges were actually made, if for no other purpose. The case does not show that it was admitted as evidence absolutely, although perhaps it is fair to assume that it was. The books of account, the admission of which was restricted and confined to original entries in the blotters, and so much of the entries in the day-books as were transcribed from the lost blotters, were also competent as memoranda of entries made by the witnesses who testified to the delivery of these items of the account. Witnesses have a right to examine entries made by them, for the purpose of refreshing their recollection, and to read the same from the books. (*Gilbert v. Sage*, 5 Lansing, 290; *Marclay v. Shultz*, 29 N. Y., 351; *Philbin v. Patrick*, 6 Abb. [N. S.], 284.) Most of the charges were proved by the plaintiff and his clerks, and although the plaintiff testifies that perhaps one or two others of his clerks may have made some entries, whose names are not remembered, and who stayed but a short time, this may detract from the weight of the testimony, but does not exclude entirely from consideration such portion of the entries as is sustained by competent proof.

The evidence as to defendant's son having no property was competent, as showing the improbability of the plaintiff's trusting him for so large an amount. It is but a circum-

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stance trivial of itself, but bearing somewhat upon the question involved. The contents of the letter to defendant's son was also admissible; and the loss of the letter was, I think, sufficiently proved to authorize the admission of secondary evidence.

The testimony showing that, upon other occasions, the defendant had paid similar debts, contracted by his son, was proper upon the question of agency, and of the son's authority to contract debts for his father. Several acts of this kind may tend to establish that such authority existed; and, although the question is a close one, I am inclined to think that there was no error in the admission of the evidence.

The motion for a nonsuit was properly denied.

The testimony as to plaintiff's custom in charging interest was, I think, properly admitted. (*Reab v. McAllister*, 8 Wend., 109; S. C., 4 Wend., 483; *Esterly v. Cole*, 3 Comst., 502; S. C., 1 Barb., 235.) But the referee erred in allowing such interest, because the proof does not establish the time when the plaintiff communicated to the defendant that such was his custom. The evidence of the defendant's knowledge is very slight. The plaintiff swears that he told defendant that his custom was to charge interest after six months; and he charged him interest on his account, and he paid it. When the plaintiff told him, and when he paid the account, is not stated. If this was after the whole account in question accrued it could be of no avail. If before, it should have been so proved. Nor does it appear how the interest in the account paid was charged. Here, there appears to be a charge of interest every six months; but it is not exactly clear how those various items are made up, or whether interest is not charged upon the interest. In a case similar to the present one, where the plaintiff has delayed bringing a suit until the statute of limitations has nearly run, and where the defendant had denied his liability and repudiated the account, under the circumstances presented, the proof should have been more clear, explicit and satisfactory; and I think

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the referee erred in allowing interest before the action was brought. The plaintiff was not entitled to interest, as the case stood, until the demand was liquidated; and the demand only bore interest from the time the suit was commenced, which was on the 23d of June, 1869.

The amount of interest charged in the account, being \$155.50, should be deducted from the whole amount, \$993.12, leaving a balance of \$837.62, for which, with interest from June 23, 1869, the plaintiff is entitled to judgment.

The judgment must therefore be reversed and a new trial granted, with costs to abide the event, unless the plaintiff consents to reduce the amount of the damages to \$837.62, with interest to the date of the report from June 23, 1869, in which case the judgment should be affirmed for the last mentioned sum and interest, without costs of appeal to either party.

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CARLETON RICE, Appellant, v. EVAN T. DAVIS, Respondent.

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

Proof was made in ejectment that an affidavit on a creditor's redemption of real estate from execution sale was presented to the sheriff: of search in the county clerk's office for the redemption papers, where they were not found, and of the probable destruction of such papers. *Held*, there being no distinct objection to the sufficiency of the search, that a copy of the affidavit was properly received in evidence.

The redemption is not invalid, at least as respects the debtor, if one of several judgments, under which the creditor purports to have redeemed, is properly certified to the sheriff.

And an affidavit proceeding upon all the judgments, but stating the amount due on each, is sufficient to support redemption under the one judgment properly certified.

And to redeem from the redeeming creditor, the judgments improperly authenticated would not be entitled to payment.

*Quere*, whether the judgment debtor may question the sufficiency of the creditor's payments on redeeming from another creditor.

An affidavit that the affiant "is the person to whom the above several described judgments are assigned, and that the same are true copies of the original assignments of such judgments," that he "carefully com

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pared them with such original assignments, and that they are true copies of such original assignments," proved by copy, the original being lost,—*Held*, a substantial compliance with the statute.

Slight variations in the verification of the assignment are not fatal.

The sheriff's certificate of redemption, in connection with his deed, held to establish that the affidavit and accompanying papers were properly presented to and left with the sheriff.

*Held*, also, that the authority of a bank cashier to assign its judgment would be presumed from the execution of an assignment by him.

The sheriff's certificate of redemption is *prima facie* evidence of the facts stated in it.

The regularity of the proceedings to redeem may be presumed from recitals in the sheriff's deed.

An original sheriff's certificate of redemption, proved by copy on the trial as lost, may be used as evidence upon appeal.

A redemption not made "on or after the last day of the fifteen months" held valid, although not made "in the county in which the sale took place."

The homestead exemption act does not affect the rights of creditors to redeem from execution sales made under judgments docketed prior to the record of the notice of exemption.

**APPEAL** by the plaintiff from a judgment ordered at the circuit in Madison county, in favor of the defendant.

The action was brought in 1870, to recover a parcel of land situate in Madison county.

The cause was tried at the Madison county Circuit in February, 1871, before Justice BALCOM and a jury.

The plaintiff read in evidence a deed from Betsy Pratt to the plaintiff, dated April 1, 1841, of the premises in question.

The plaintiff proved that he was in possession of the premises several years, and that subsequently and until the trial the defendant was in possession. The plaintiff further gave evidence that Betsy Pratt was the widow of Dr. Pratt; that he, prior to his death, occupied the premises, and that she occupied them for a time after his death.

The defendant proved that in November, 1853, Gerrit Smith recovered, in the Supreme Court, a judgment against Rice, the plaintiff in this suit, which was docketed in Madison county.

That an execution thereon was duly issued to and received



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by S. P. Chapman, sheriff of Madison county, September 3, 1860, which was returned and filed May 27, 1861, with a return of "satisfied" indorsed thereon, dated December 28, 1860.

The defendant also read in evidence a deed made by Chapman, sheriff, dated April 2, 1862, and acknowledged and recorded, conveying the premises in question to La Mott Thomson, and a deed of the same premises from Thomson to the defendant, dated April 18, 1866, and duly recorded.

The deed from the sheriff to Thomson, dated April 2, 1862, was read in evidence and is produced on this argument. It recites that, by virtue of the execution in favor of Smith, against Rice, issued to Chapman as sheriff, he did, on the 28th of December, 1860, sell the right and title of Rice in and to the premises in question, and that Smith became the purchaser at the price of \$436; and that he made and filed in the clerk's office of Madison county a certificate of such sale.

The deed further recites that Thomson, on the 26th of March, 1862, made redemption by virtue of judgments and proceedings mentioned in the deed, and by paying to him, Chapman, \$528.52.

The defendant gave testimony tending to show that the certificate of sale filed by the sheriff was destroyed by a fire which occurred in Madison county clerk's office in 1865.

The defendant also gave in evidence the certificate of redemption given to Thomson by Chapman, as sheriff, dated March 26, 1862, and acknowledged on that day, and proved that the certificate or statement of redemption which was claimed to have been filed in Madison county clerk's office could not be found, and introduced proof to show that it was destroyed by the same fire above mentioned.

The defendant also produced the original certificate, claiming that it could properly be used upon the argument.

It further appeared that the papers left with the sheriff on making the redemption could not be found, and the defendant gave evidence as to the same.

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A copy of the affidavit upon which the redemption was made was produced, as follows :

ONEIDA COUNTY, ss. :

On this 16th day of March, 1862, before me came La Mott Thomson, to me known to be the person described, and, being by me duly sworn, deposes and says that he resides in the city of Utica, Oneida county, N. Y. ; that he is the person to whom the above described several judgments are assigned, and that the same are true copies of the original assignments of such judgments to me ; that he has carefully compared them with such original assignments, and that they are in every respect true copies of such original assignments to me. And this deponent further saith that there is due upon the several above described judgments assigned to me, at this date, the sum of six hundred and thirty-four dollars and thirty-eight cents (\$634.38), to wit: Upon the first described judgment, marked No. 1, there is due the sum of \$236.58 ; upon the second described judgment, marked No. 2, there is due the sum of \$123.99 ; upon the third described judgment, marked No. 3, there is due the sum of \$169.31 ; upon the fourth described judgment, marked No. 4, there is due the sum of \$104.50, making a total of \$634.38.

*March 20th, 1862.*

Subscribed and sworn to before me, and certified by me, the 26th day of March, 1862.

(Copy.)

L. M. T.

In respect to this copy, the deponent testified that he presented the papers for redemption, under the judgments named, to the sheriff, and then exhibited to him the original assignments of the judgments, and presented to him the original affidavit ; that the copy produced was like the original, except that his name was written in full, and it appeared to have been sworn before and signed by a justice of the peace. The assignments of judgments were also given in evidence, viz. :

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## SUPREME COURT—ONEIDA COUNTY.

JOSEPH BRUCE, PRESIDENT OF THE BANK OF WHITESTOWN, <i>against</i> CARLTON RICE.	}
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Judgment entered and perfected in Oneida county December 27, 1856, for \$219.14, and transcript filed and judgment docketed in Madison county December 29, 1856; execution issued to Madison county sheriff, and received by the sheriff March 13, 1857.

W. O. MERRILL,  
*Attorney.*

## SUPREME COURT—ONEIDA COUNTY.

JOSEPH BRUCE, PRESIDENT OF THE BANK OF WHITESTOWN, <i>against</i> CARLTON RICE, LUTHER RICE and CARLTON S. LEWIS.	}
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Judgment entered and perfected in Oneida county December 27, 1856, for ninety dollars and eighty-one cents; transcript filed and judgment docketed in Madison county December 29, 1857; execution issued to sheriff of Madison county, and received by him.

C. H. SMITH, *Deputy.*  
W. O. MERRILL, *Att'y.*

*March 13, 1857.*

Know all men by these presents: That the Bank of Whites-town, an association formed under and in pursuance of an act, entitled "An act to authorize the business of banking," passed April 18, 1838, and the acts supplementary thereto and amendatory thereof, does hereby, in consideration of the payment of the aforesaid judgments to the said bank by La Mott Thomson, the receipt whereof is hereby acknowledged,

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assign, transfer and set over unto the said La Mott Thomson the above mentioned judgments, and the debts thereby secured, and the benefit of the execution issued and now in the hands of the sheriff thereon, but at his (said Thomson's) own risk, cost and expense. The said Thomson to pay all sheriff fees and the amount due on the judgment.

In witness whereof, I, Israel J. Gray, the cashier of the said association, as such cashier, have hereunto affixed my hand and the corporate seal of said association, this 25th day of April, A. D. 1857, by order of the board of directors.

ISRAEL J. GRAY,

*Cashier of the Bank of Whitestown.*

STATE OF NEW YORK, }  
ONEIDA COUNTY, } ss.:

On this 25th day of April, 1857, before me came Israel J. Gray, to me known to be the person described in and who executed the preceding assignments, and acknowledged the execution of the same, and, being by me duly sworn, says that he is the cashier of the Bank of Whitestown, the above named association; that the seal affixed to the preceding assignment is the corporate seal of the said association, and that said corporate seal, and his signature as such cashier, were affixed to seal, and his signature as such cashier were affixed to said assignment by the authority and direction of the said association.

MORRIS WILCOX,

*Justice of the Peace of Oneida County.*

### SUPREME COURT.

Parties against whom Judgments are obtained.		Parties in whose favor Judgments are obtained.		Judgments, where perfected.
CARLTON RICE.		SAMUEL S. ABBOTT and IRA M. MOORE.		Madison County.
Damages.	Costs.	Judgment, when perf.	When dock.	Attorney.
\$229 61	\$10 62	1857, Jan. 16.	1857, Jan. 16, 11 A. M.	Abbott and Moore in pers.

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STATE OF NEW YORK: }  
MADISON COUNTY, } ss.:  
Clerk's Office. }

I certify the foregoing is a true copy of the docket of a judgment entered in this office; and having compared the same with said docket, I find it to be a correct transcript therefrom and of the whole of the docket of said judgment. In testimony whereof, I hereunto set my hand, this 16th day of January, 1857.

CHAS. L. KENNEDY,  
*Deputy Clerk.*

For value received from La Mott Thomson, we do hereby sell, transfer, assign and set over unto said La Mott Thomson the judgment, a transcript of which is hereto attached, and all our right, title and interest, claim and demand therein, together with the execution and levy made thereunder, with full power to collect said judgment in our names or otherwise, for his own use and benefit; and we do also, for a valuable consideration, sell, transfer and assign unto said La Mott Thomson the attached personal mortgage against Carlton Rice, and all our right, title, interest, claim and demand thereto.

Witness our hands and seals, this 28th March, 1857.

SAMUEL S. ABBOTT. [L. s.]

IRA M. MOORE. [L. s.]

COUNTY OF MADISON, ss.:

On this 30th day of March, 1857, before me personally came Samuel S. Abbott and also Ira M. Moore, well known to me to be the individuals described in and who executed the within assignment, and they severally acknowledged that they executed the same.

J. MASON,  
*Justice of the Peace.*

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## MADISON COUNTY COURT.

ELI BUELL, JR., against CARLTON RICE.
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Judgment obtained in Justice's Court before J. Mason, justice of the peace of Hamilton, in the county of Madison, N. Y. Transcript of the justice judgment filed and the judgment docketed on the 20th day of December, 1856, for seventy-six dollars and forty-three cents, being the only judgment in favor of plaintiff against defendant docketed in Madison county. In consideration of seventy-six dollars and forty-three cents, to me in hand paid by La Mott Thomson, of the city of Utica, N. Y., I do hereby assign, transfer and set over to said Thomson the above described judgment, and all my right, title and interest in and to the above described judgment, and in and to all right by me acquired thereon.

ELI BUELL, JR. [L. s.]

Dated *November 4th*, 1859.

MADISON COUNTY, ss.:

On this 5th day of November, A. D. 1859, before me personally appeared Eli Buell, Jr., to me well known to be the person described in the within judgment, and to be the person who executed the foregoing assignment and acknowledged that he executed the same.

J. MASON,

*Justice of the Peace.*

The counsel for the plaintiff read in evidence a paper to exempt the premises under the homestead exemption act, recorded in March, 1854.

The plaintiff gave evidence to show that Gerrit Smith released the premises from the sale.

The court ruled and decided that the plaintiff was not entitled to recover and nonsuited him.

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Rice v. Davis.

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Objections were made to the proof offered, and exceptions taken, which appear sufficiently in the opinion.

A judgment was entered in favor of the defendant, and the plaintiff appealed.

*A. N. Sheldon*, for the plaintiff and appellant.

*F. Kernan*, for the defendant and respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. The title of the defendant to the real estate in controversy in this action depends mainly upon the question, whether there was a valid redemption of the same by La Mott Thomson, as holder of a certain judgment, or certain judgments, against the plaintiff.

It is claimed by the counsel for the plaintiff that the redemption was insufficient, and that the formalities of the statute were not complied with, in the papers presented to the sheriff, for the purpose of redeeming the real estate sold by him. (3 R. S., 5th ed., 654, § 76.)

Various objections are urged to the validity of the alleged redemption, which I will proceed to consider. It is said that no redemption affidavit, but only a paper claimed to be a copy, was introduced in evidence. There was proof that an original affidavit was presented to the sheriff; that search had been made in the county clerk's office for the redemption papers; that they could not be found, and their probable destruction by fire was shown, if they were ever there. Although the plaintiff reserved all legal questions and objections, as to the sufficiency, form and effect of the paper, the distinct point was not taken that the search made was insufficient, or that search should have been made at the sheriff's office. As the evidence stood, I think that the copy was properly received in evidence.

It is urged that there was only a certified copy of a docket of one of the four judgments presented to the sheriff. It is,

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I think, a sufficient answer to this objection to say, that although the redemption was intended to be under several judgments, yet there being a duly certified copy of one of them, it was sufficient to make the redemption valid, so far as the plaintiff was concerned. (*The People v. Ranston*, 4 Den., 145, 147; *Miller v. Lewis*, 4 Coms., 554.) It was enough that one of the judgments was properly certified, and as this would entitle the owner to redeem, the remainder may be disregarded as unnecessary. The same remarks apply to so much of the affidavit as shows other judgments and states the sum total of all. As the affidavit specified the amount due upon each one of them, there could be no mistake and no false statement. Nor does it follow that a creditor, redeeming from Thomson, would be obliged to pay the full amount of all the judgments, with interest; for those not properly authenticated clearly were not entitled to be paid. Even if such was the result, it is questionable whether the plaintiff is in a position to avail himself of an objection of this character.

A criticism is made upon the form of that portion of the affidavit which states that "the same are true copies of the original assignments to him." Having previously stated that the affiant "was the person to whom the above described judgments were assigned," I think it may fairly be inferred that the word "same" refers to the assignments of the judgments. This is more manifest by the reference made to the copies of the original assignments, as well as the subsequent clause, "that he has carefully compared them with such original assignments." In considering the form of the copy affidavit, it must be borne in mind that it is only a copy of a lost paper, probably not entirely accurate or precisely like the original which was lost, and proper allowance must be made on that account. It is, I think, in substance, according to the statute, by all reasonable rules of interpretation and the authorities, and not liable to any objection upon the ground stated.

The assignments of the judgments were, I think, sufficiently proven, being duly verified by affidavit of the redeeming creditor, as required by that statute. Slight variations are not



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regarded as fatal. (See *ex parte* Newell, 4 Hill, 608; *Aylesworth v. Brown*, 10 Barb., 167.)

The copy certificate, the original of which was produced upon the argument, in connection with the sheriff's deed, establishes that the affidavit and the accompanying papers were properly presented to and left with the sheriff as required by law.

It is not important as to all of them, as we have seen, if one of the judgments was properly certified and the assignment duly executed; but I am inclined to think that the assignment by the cashier of the Bank of Whitestown was duly executed. The cashier's authority will be presumed, unless the contrary appears. (*Bank of Vergennes v. Warren*, 7 Hill, 91.) The assignments were sufficiently verified by the oath of the claimant, and it was not necessary, I think, that they should be filed in the county clerk's office.

No other objections are made to the validity of the redemption papers which require remark.

It may be added, that the original sheriff's certificate to Thomson (a copy of which is referred to in the case) is produced upon the argument, and by statute is *prima facie* evidence of the facts therein stated. (3 R. S., 5th ed., 656, §§ 84, 85.) The regularity of the proceedings to redeem is also to be presumed from the recitals in the sheriff's deed. (*Hartwell v. Root*, 19 Johns., 345.) The right to introduce documentary evidence upon the argument is abundantly established by authority. (2 Johns., 46; 5 Wend., 535; 13 Wend., 524.) If the defendant had rested his case after the introduction of the sheriff's certificate and deed, his title would have been established without the redemption papers, until there was some rebutting testimony. The secondary evidence as to the redemption proceedings would, therefore, have been superfluous.

There is no force in the objection that the redemption was void because it was made out of the county of Madison, where the premises were situated and sold. The statute provides that redemptions, made "on or after the last day of the fifteen

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months," \* \* \* "shall be made at the sheriff's office of the county in which the sale took place." (3 R. S., 5th ed., 656, § 82; *Gilchrist v. Comfort*, 34 N. Y., 233.) The redemption here was not on or after, but before the last day, and therefore it was not made in violation of the provisions of the statute cited.

The offer to prove a release from Gerrit Smith to the plaintiff was properly overruled. The consideration upon which the release was to be given had entirely failed. The bond and mortgage which was to have been executed was not given, and hence it is apparent that the release from Smith never became valid and effectual.

Nor was the lien of the Thomson judgments, for the purpose of redemption, affected by the homestead exemption claimed by the plaintiff. They were rendered before the sale of the real estate upon the Smith judgment, and the statute authorizes a redemption by any creditor or assignee "having a judgment rendered at any time before the expiration of fifteen months from the time of the sale. (3 R. S., 5th ed., 652, § 67.) The judgment or judgments upon which the redemption was claimed to have been made were clearly within the statute. While the act suspended a sale upon an execution, and prevented Thomson from selling by virtue of these judgments, it did not interfere with his right to redeem from the purchaser upon a sale upon a judgment docketed prior to the recording of the notice of exemption. (S. L. of 1850, chap. 260; *Smith v. Brackett*, 36 Barb., 571; *Allen v. Cook*, 26 id., 374-378.) In construing this statute we are not at liberty to extend its provisions beyond its plain intent, and as the title passed to Smith after the expiration of a year, subject to the creditor's right of redemption, and such redemption was made by Thomson, under whom the defendant claims title, the plaintiff had no right to recover. There was no error upon the trial and the judgment must be affirmed, with costs.

Judgment affirmed.

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Livingston v. Pettigrew.

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MATTHEW H. LIVINGSTON v. JOHN W. PETTIGREW and others.

(GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1872.)

An assignment running in the name of J. P., receiver, &c., and signed "J. P., receiver," contained a covenant that the assigned claims were due and unpaid. *Held*, that J. P.'s intention was to covenant officially, not individually.

Otherwise the intent to make a personal covenant should have been expressed.

Whether a receiver may not covenant, as receiver, that claims are due and unpaid, *quere*.

Having so covenanted, however, he is not liable personally on his covenant. Cases in which executors, administrators and trustees have been held personally liable upon their covenants, distinguished. (Per MILLER, P. J.)

Whether the covenant made, without prior agreement therefor, on giving a written assignment of the claims, and after the sale and the delivery of a bill of sale, without new consideration, is supported by any consideration, *quere*.

MOTION, by the plaintiff, for a new trial upon a case, and exceptions ordered to be heard in the first instance at General Term.

The action was brought against the defendants to recover the amount of a judgment alleged to have been sold by the defendant, as receiver. The cause was tried, at the Albany Circuit, before the Hon. WILLIAM L. LEARNED and a jury, in January, 1872. It appeared that upon the trial on the 20th of January, 1866, John Pettigrew, then deceased, was appointed, by this court, receiver of the Central Bank of the city of New York.

On the 12th of June, 1866, he proceeded to advertise for sale, by auction, all the personal estate of the bank.

On the 24th of July, 1866, the sale took place, when the plaintiff's agent attended and bid off, in the name of the plaintiff, twenty-two judgments against different individuals for the sum of \$169, which was then paid, by cash and check, and a bill of sale was then executed and a receipt given by and in the name of Benjamin P. Fairchild, the

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auctioneer. The judgment in this case, with two other items, was bid off for two dollars; and afterward, and on the 15th of August, 1866, the agent called on John Pettigrew and he executed an assignment, which was as follows.

"I, John Pettigrew, of the city of New York, receiver of the Central Bank of the said city of New York, in consideration of the sum of \$169, to me in hand paid by Matthew H. Livingston, of the city of Albany, as such receiver have sold and transferred to the said Matthew H. Livingston and to his use and benefit the several judgments and claims mentioned and set forth in the annexed bill of sale of Benjamin P. Fairchild, auctioneer, of the city of New York, bearing date the 24th day of July, A. D. 1866, made by and under my direction, as such receiver aforesaid, to the said Matthew H. Livingston, and I hereby covenant that the said several judgments and claims are due and unpaid.

"In witness whereof, as such receiver, I have hereunto set my hand and seal, this 15th day of August, A. D. 1866.

"JOHN PETTIGREW [L. S.],

[Five Cent Rev. St.-  
Canceled.]

"Receiver."

On the 27th of August, 1866, the sale, by the receiver, was confirmed by an order of this court and a dividend made of the proceeds and the estate soon afterward settled up.

And on the 6th of September, 1867, an order was made confirming a report of the receiver and discharging him and his sureties from further duties or liabilities under the receivership.

The claim of the plaintiff was not presented till three years after the sale and one year after the death of John Pettigrew.

The auctioneer testified that he sold only the right, title and interest of the Central Bank, whatever they might be, and so announced at the time of the sale.

The defendants moved for a nonsuit upon the grounds:

"1st. That the instrument in question purports to be the

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act of Pettigrew, in his official character, as receiver, and his estate is not liable under it.

"2d. That there is no proof of an order of the court authorizing a sale of this property.

"3d. That the assignment introduced is without consideration, the annexed schedule and the bill of sale showing that the sale was made by Fairchild, and that no new consideration passed when the assignment was executed.

"4th. That the bill of sale purports to be a transaction between Fairchild and another, which was completed by payment upon the day of its date. The assignment is nearly a month later between different parties."

Plaintiff's counsel requested the court to submit the case to the jury. The court refused so to do, and granted the motion for nonsuit; to both of which rulings plaintiff excepted.

The court allowed the plaintiff sixty days to make a case, ordering the same to be heard in the first instance at the General Term.

Exceptions were taken by plaintiff, to the rulings of the court in the admission and rejection of evidence, which are referred to in the opinion.

*W. S. Hevepor*, for the plaintiff.

*A. J. Parker*, for the defendants.

Present—MILLER, P. J., POTTER and PARKER, JJ.

By the Court—MILLER, P. J. I think the nonsuit was properly granted. The plaintiff in this action seeks to recover upon the covenant of Pettigrew, whose estate the defendants represent, that the judgments and claims assigned were due and unpaid. The assignment is stated in the commencement as that of "John Pettigrew, of the city of New York, receiver of the Central Bank," &c., and was signed "John Pettigrew, Receiver." It is therefore apparent, upon the face of the

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instrument, that all which Pettigrew intended to do was to make an assignment in his official capacity; and the covenant, as to the demands being due, must be considered, I think, as a mere act as receiver, and not as an individual act. Had the intent been otherwise, then a clause should have been inserted that he covenanted personally, or to that effect. As none such appears in the instrument, and it plainly shows on its face that the whole transaction was one performed by Pettigrew as an officer of the court, this is the only fair interpretation which can be placed upon it.

The liability, therefore, if any was incurred, was for the estate, upon a sale of its effects; and Pettigrew not only had no personal interest in it, but he did not assume any in the instrument itself.

If the covenant is valid, as the act of the receiver, then the remedy would be against the estate which Pettigrew represented.

A receiver is an officer of the court acting under its authority, and most generally by its order and direction, and I am not satisfied that it would be entirely beyond the scope of his powers, in some cases, to covenant that a certain amount was due upon an obligation. If such a covenant would add to the price of personal property exposed for sale, it perhaps might not be an excess of authority to make it, in view of the fact that it would materially promote the interests he had in charge.

In some cases it might become highly important to make representations as to the value and character of assets in his hands, which would render him liable, officially at least, and I am not prepared to say that a covenant of the character of the one contained in the assignment is entirely without authority and invalid.

But assuming that the covenant in question was void because the receiver exceeded his powers and that it did not bind the estate, the question arises, whether he thereby rendered himself personally responsible for a breach of it. I am inclined to think that he did not, and that the instrument itself, show-

ing that the act was done as receiver, it cannot, under any circumstances, be construed as a personal covenant.

The party who took the assignment knew all about its contents as they appeared, and as it is presumed he knew the law, it is fair to assume he knew also that the covenant was void upon its face, if such was the law. He therefore has no valid grounds for claiming that he has, in any way, been misled or deceived. He trusted to the receiver in his official capacity, understood that he acted as such, and upon no sound principle can it be claimed that under such circumstances the receiver should be personally liable. It is no answer to this position to say that the receiver should have informed himself, before the sale, whether any and what amount was due upon the judgment. It is to be assumed, in the absence of any proof to the contrary, that he acted in good faith, and so long as he only acted as receiver and not as an individual, it is also to be presumed that the purchaser only trusted him, and relied upon the covenant as one entered into by him in his official capacity.

There is no reported case which holds that a receiver is liable personally upon a covenant of this character.

The liability of an executor or administrator or a trustee, upon a covenant as such, rests entirely upon a different principle.

An executor or administrator represents an estate, while a receiver is an officer of the court, and the former are often made liable, because their agreements import a consideration or an admission of assets in their hands. (2 Williams on Ex'rs, 1515, 1516, and authorities cited; 9 Wend., 273; 13 id., 557.) So where an executor or administrator submits in broad terms to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally liable to pay the award, whether he has assets or not. (5 Term Rep., 7.) This is for the reason that if he thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such admission.

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(2 Ch., 40; see also 1 Term, 691; 7 Term, 453.) This, however, may depend upon the terms of the submission and also of the award. (5 Term, 6.) An administrator or executor is only liable upon a note given for the debt of the deceased, when there are assets or forbearance was the consideration of the note. (*Bank of Troy v. Topping*, 9 Wend., 273.)

In this State it never has been held that they are liable, personally, upon a covenant in their representative capacity.

The counsel for the plaintiff has cited some cases from other States, which it is claimed sustain the principle that an executor or administrator may render himself personally liable upon his covenant.

The case of *Sumner, adm'r, v. Williams* (8 Mass. R., 162) is relied upon as upholding this doctrine. In this case the defendants, as administrators under the license of the court to sell the real estate of their intestate for the payment of his debts, sold an equity of redemption of which the testator was supposed to die seized, and in their deed they covenanted, in their capacity as administrators, that they, as administrators, were lawfully seized of the premises; that they were clear of all incumbrances except a mortgage; that they had in such capacity good right to sell, etc., and that, as administrators, they would warrant and defend the same, etc. And it was held, by a divided court, in an action against them upon the covenant of warranty, etc., after an eviction by a paramount title, that they were answerable personally on their covenant. SEDGWICK, J., delivered an able, strong and well reasoned opinion against the liability of the defendants; and the other two judges placed their opinions very much upon the grounds that the covenants were, from their nature and the circumstances, peculiarly of a personal character. At page 204, SEWALL, J., says: "The case at bar is an alleged breach of an express personal covenant, annexed to a conveyance of an interest, valuable in legal contemplation, of a value acknowledged by the consideration received for it by the defendants, for which their conveyance of it was made."



PARKER, J., at page 213, says: "Indeed, there are certain covenants in this deed which no one could imagine, for a moment, could be enforced except against the defendants in their private capacity. Such is the covenant that they were seized in fee simple of the estate sold, that they had good right to sell."

This is the only reported case which goes to such an extent; and the others which are cited do not sustain any such doctrine. If it be applicable to an administrator, which there is, in my opinion, strong reason to doubt, there is certainly no sufficient reason why it should apply to a receiver whose powers and duties are of entirely a different character, and who acts in a different capacity. The reasons for upholding the liability of an administrator personally, upon covenants made in a deed given under the especial authority of a court for a consideration of value, have no application to an assignment of a judgment sold by an auctioneer at a receiver's sale, without any condition as to covenants, and where it is quite apparent that a personal covenant was not only inapplicable to the case and unwarranted by the consideration paid or the circumstances, but, as the testimony shows, was not intended or contemplated by the parties. Even if the rule contended for may be applicable in some cases to the acts of administrators, I think it should not be extended.

I entertain considerable doubt whether there was a sufficient consideration for the assignment from Pettigrew. The sale was made by the auctioneer; the bill of sale made out in his name; the assignment, which I am inclined to think was not necessary to perfect the title, was executed more than twenty days after the sale, and no money was paid to Pettigrew personally. What he received was as receiver, for the benefit of the estate. Besides, there was no such condition attached to the sale, and no such terms made or exacted.

It is also questionable whether the damages, if any, are not merely nominal; and therefore this is not a case where the court should grant a new trial. But, passing by other

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questions, it is enough that the receiver was not personally liable, to sustain the nonsuit.

The decisions of the court upon questions of evidence are not material, if I am right upon the main question discussed. The judgment must be affirmed, with costs.

Judgment affirmed.

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**THE ANCIENT CITY SPORTSMAN'S CLUB, etc., Respondent, v.  
PETER MILLER, Appellant.**

(GENERAL TERM, THIRD DEPARTMENT, MARCH, 1878.)

The act of 1865 (chap. 868), which authorizes incorporations for "Social, gymnastic, esthetic, musical, yachting, hunting, fishing, batting or lawful sporting purposes," does not allow incorporations for the purpose of instituting actions to recover penalties for violations of the game laws. So far as a certificate of incorporation under the act expresses such an object, it is unauthorized and void.

The authority given to the corporation by the act, to sue and be sued, is subject to the qualification that it is in relation to some matter within the scope of the statute and legitimate purpose of the organization.

The statute (chap. 721, L. 1871), under which certain penalties may be recovered by any person in his own name, etc., does not confer the power to prosecute for them upon corporations.

This is an appeal by the defendant from a judgment of the Schenectady County Court, affirming a judgment for the plaintiff, rendered in the court of a justice of the peace.

The action was brought under the game law (chap. 721, Laws 1871), to recover a penalty for taking fish with a net in the Mohawk river. The parts of that law which are applicable read as follows:

"§ 25. No person shall kill or catch any fish in the Mohawk or Clyde rivers,      \*      \*      \*      by any trap, dam, weir, net, seine, or by any device whatever, other than that of angling with hook and line, or with a spear, under a penalty of twenty-five dollars for each offence."

"§ 38. All penalties imposed by this act may be recovered,

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with costs of suit, *by any person*, in his own name, before a justice of the peace, in the county where the offence was committed or where the defendant resides, when the amount recovered does not exceed the jurisdiction of such justice."

Plaintiff is a society, incorporated under chap. 368, Laws 1865, and its objects are stated in the certificate as follows: "*Second. The business and objects of this society are the enforcement of all existing laws and ordinances for the preservation of game and fish*, and the enactment of such further local legislation as may still further advance the pleasures of true sportsmen in the Mohawk river and other streams, and in the woods of the county, and socially to cultivate the manly exercises of rifle, gun and rod."

The parts of the act under which plaintiff was incorporated, which are material, are as follows:

"§ 1. Any five or more persons of full age, citizens of the United States, a majority of whom shall be also citizens of this State, who shall desire to associate themselves for social, gymnastic, esthetic, musical, yachting, hunting, fishing, bathing or lawful sporting purposes, may make, sign and acknowledge, before any officer authorized to take the acknowledgment of deeds in this State, and file in the office of the Secretary of State, and also in the office of the clerk of the county in which the office of such society shall be situated, a certificate in writing, in which shall be stated the name or title by which such society shall be known in law, the particular business and object of such society, the number of trustees, directors or managers to manage the same, and the names of the trustees, directors or managers for the first year of its existence, but such certificate shall not be filed, unless by the written consent and approbation of one of the justices of the Supreme Court of the district," etc.

"§ 2. Upon filing a certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors, shall thereupon, by virtue of this act, be a body politic and corporate, by the name stated in such certificate, and by that name they and their successors

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shall and may have succession, *and shall be persons* in law *capable of suing* and being sued," etc.

Upon proof of defendant's taking of fish, by a net, from the Mohawk river, plaintiff recovered a judgment for twenty-five dollars in the court of a justice of the peace. Upon appeal by the defendant, that judgment was affirmed by the County Court, and defendant appeals to this court.

*J. H. Clute*, for the appellant.

*E. W. Paige*, for the respondent.

Present—MILLER, P. J.; DANIELS and INGALLS, JJ.

INGALLS, J. We are satisfied that the plaintiff was not authorized to maintain this action, for the reason that the statute of 1865, under which the plaintiff was organized as a society, does not authorize the formation of a corporation for any such purpose. The objects for which such a society may be formed are specified in said statute, as follows: "who shall desire to associate themselves for social, gymnastic, esthetic, musical, yachting, hunting, fishing, batting or lawful sporting purposes." This statute was amended the same year (see chapter 668 of Laws of 1865) by adding, after the word "social," the words "temperance, benefit." This amendment does not enlarge the statute in this particular, so as to affect the question under consideration. The statute does not, in my judgment, either directly or by reasonable implication confer the power to organize a society for the purpose of instituting actions to recover penalties for a violation of the game laws. No such purpose is defined by the statute, and it is quite apparent that none such was intended by the legislature. A corporation, so far as I can perceive, might as appropriately be organized under that statute to enforce all the laws of the State of New York. If the view thus taken is sound, it follows that the portion of the certificate under which the plaintiff claims authority to maintain this

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action is unauthorized and void. It does not aid the plaintiff that the statute of 1865 authorizes a corporation formed under it to sue and be sued, as that provision is subject to the qualification that it must be in relation to some matter within the scope of the statute, and the legitimate purpose of the organization. It is worthy of notice that the statute of 1871, chapter 721, which creates the penalty sought to be recovered, provides as follows: "All penalties imposed by this act may be recovered, with costs of suit, by *any person in his own name before a justice,*" etc. The language employed does not indicate that the legislature intended to confer this power to prosecute upon a corporation, or that the authority to organize a society for such a purpose existed. We abstain from discussing the question as to when, and under what circumstances, a corporation will be regarded as a person for certain purposes. The objection was sufficiently raised by the defendant upon the trial: 1st. By objecting to the introduction of the certificate of incorporation as immaterial and irrelevant. 2d. By moving for a nonsuit on the ground that the plaintiff, as a corporation, had no legal right to maintain the action. 3d. That the plaintiff had wholly failed to make a case. The defect was so radical and complete that the plaintiff's case could not possibly have been remedied if there had been a more specific statement of the ground of objection by the defendant.

The judgment of the County Court and of the justice must be reversed, with costs.

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Caryl v. Williams.

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CHRISTINA A. CARYL v. CHAUNCEY P. WILLIAMS and others.

(SPECIAL TERM, SCHOHARIE COUNTY, FEBRUARY, 1873.)

The execution and delivery of a mortgage in payment of a note is a sufficient consideration to support an agreement to discharge the note.

An assignment of the mortgage, so received, transfers the title to the mortgage debt.

Where the mortgage was given by a married woman on her separate estate in payment of her husband's note,—*Held*, that it was admissible to show the consideration of the note to have been money borrowed for her, and employed in improving the mortgaged property.

An answer in foreclosure, alleging the invalidity of the mortgage in suit, and title to the premises under a subsequent mortgage, is not a counterclaim, but an equitable defence.

An answer in an action to foreclose a mortgage, that it is of no binding effect and no lien upon the premises described in the complaint, is a statement of a conclusion unsupported by facts, and unavailing.

THIS is an action to foreclose a mortgage held by the plaintiff as the assignee thereof.

*W. C. Lamont & W. H. Young*, for the plaintiff.

*H. S. McCall & H. Krum*, for the defendant.

INGALLS, J. In the month of November, 1867, the defendant, Christopher Hetzel, borrowed of W. C. Lamont \$600 without giving any security therefor at the time. Subsequently, and in June, 1868, he executed a note for the money, which was also signed by John C. Caryl as surety, payable to said Lamont, who transferred the same to Jerome Kromer. On the 16th day of December, 1868, a mortgage was executed by Maria Hetzel and Christopher Hetzel to said Kromer to secure the payment of \$621.15, being the amount originally loaned by said Lamont, with the interest thereon. The land embraced in such mortgage was the separate property of said Maria Hetzel, who is the wife of said Christopher. The mortgage was, on the 28th day of January, 1869, assigned by said Jerome Kromer to the plaintiff, who now

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asserts the same. The defendant, Williams, claims title to a portion of the premises described in said mortgage, acquired under and by virtue of the foreclosure of certain mortgages executed subsequent to the mortgage in suit. And Williams claims that the plaintiff's mortgage is ineffectual as a lien, as against the title acquired by him as aforesaid. The evidence shows that the money procured from Lamont was expended by Christopher Hetzel, as the agent of his said wife, in constructing a mill upon the mortgaged premises, and in payment of taxes assessed upon said premises. That said Christopher was the agent of his said wife in managing her property, and so represented himself to said Lamont when the money was loaned of him; and also disclosed to said Lamont the purpose to which the money was to be devoted, viz., the erection of said mill. That at the time the mortgage was executed by Mrs. Hetzel, the purpose for which it was given was explained to and understood by her, and she executed the same for the purpose of satisfying the note executed to said Lamont. She recognized the debt as her own to pay, because the money was loaned for the purpose of improving her individual property, and devoted to that purpose by her husband, as her agent, and with her knowledge and consent. The note was satisfied by the execution of the mortgage. Such was clearly the understanding and intention of the parties, and the note would have been surrendered or canceled but for the fact that the same was lost. The mortgage was a new and superior security, and, hence, constituted a sufficient consideration for the agreement to discharge the note. (*Rice v. Dewey*, 54 Barb., 472.) The assignment of the mortgage to the plaintiff transferred to and vested in her the ownership thereof. (*Hone v. Fisher*, 2 Barb. Ch. R., 560; *Severance v. Griffith*, 2 Lans., 38.) Parol evidence was properly received to show the consideration of the mortgage, and the reason why Maria Hetzel created a lien upon her separate property to satisfy the note. In investigating a subject of the nature involved in this controversy, and where conflicting equities are sought to be established, great latitude of exami-

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nation is to be tolerated, especially so where the intention of the parties constitutes an important subject of inquiry. It is quite apparent that the note was referred to in the mortgage with a view to show the consideration of the mortgage, and not for the purpose of keeping the note in life. The defendant's counsel insisted, upon the trial, that the answer contained a counter-claim, to which no reply had been interposed, and, therefore, the defendant was entitled to judgment. There are two answers to this proposition: First. The facts alleged do not amount strictly to a counter-claim which calls for a reply. The portion of the answer which the defendant claims to be a counter-claim amounts simply to an equitable defence, and, therefore, no reply was required. (*Bates v. Rosekrans*, 37 N. Y., 409; *Agate v. King*, 17 Abb., 159; *Vassear v. Livingston*, 13 N. Y., 249.) Second. If it should be assumed that the answer amounted to a counter-claim, and therefore a reply was necessary, the only effect of the omission to reply would be to admit the facts alleged, and if such facts, thus admitted, did not amount to a defence, the defendant would not be entitled to judgment. I am of opinion that the facts alleged do not constitute a defence to the action. (*Van Valen v. Lapham*, 13 How., 240.)

The following allegation contained in the answer, "This defendant is informed and believes that the mortgage set forth in the complaint was of no binding force and effect, and no lien upon the farm and premises described in the complaint herein," amounts simply to the statement of a conclusion, without facts to support it, and is therefore unavailing to the defendant. The plaintiff must have judgment.



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Dunham v. Sage.

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## ALBERT T. DUNHAM, Ex'r, &amp;c., v. ALBERT G. SAGE.

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(RENSSELAER COUNTY SPECIAL TERM, JUNE, 1871.)

Under section 101 of the Code, before 1870, when the exception for the benefit of married women was stricken out by amendment, their disability under the statute of limitations was not continued after death in behalf of their estates.

Upon a married woman's decease, as the statute stood when that amendment was made, her representatives had the usual time from the accruing of a debt in her favor, and an additional one year, allowed by the last clause of section 101, in which to bring an action.

The failure of an appointment of executors upon an estate does not save the running of the statute of limitations.

ACTION to compel specific performance of a parol agreement, and to recover an amount awarded by arbitrators.

*John H. Reynolds*, for the plaintiff.

*W. A. Beach*, for the defendant.

INGALLS, J. Upon the argument of this cause the respective counsel conceded the validity of the award, and that it embraced the entire cause of action contained in the complaint. The defendant's counsel insists that the plaintiff's cause of action is barred by the statute of limitations. This, therefore, presents the only question to be determined. The award was made on the 31st day of August, 1857. Mrs. Dunham, to whom the \$2,000 was made payable by the terms of the award, died on the 4th day of February, 1862. Letters testamentary upon her will were issued to the plaintiff on the 6th day of February, 1867. This action was commenced on the 18th day of February, 1867. Mrs. Dunham was the wife of the plaintiff when the award was made, and so continued until her death. The present section 101 of the Code, from the time of its adoption in 1848, as section eighty-one, up to May 6th, 1870, when it was amended by striking out the words "*four, or a married woman*" contained the last mentioned words, which created a disability

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and prevented a cause of action possessed by a married woman from becoming barred by the statute of limitations. By an amendment of said section in 1851, such disability was reduced to a period of five years. The amendments took effect from the time they were adopted. (*Ely v. Holton*, 18 N. Y., 596.) When the amendment of 1870 was made, this action was not only commenced, but partly tried. Upon the facts of this case, with the law applicable thereto, I am convinced that the cause of action has become barred by the statute of limitations. A right of action accrued to Mrs. Dunham on the 31st day of August, 1857, the date of the award, which she was at liberty to assert if she chose, but not compelled to during coverture, provided that did not continue beyond five years. By her death the disability ceased, and her representative had from that period until the expiration of seven years from the date of the award to commence an action, which embraced the ordinary limitation of six years, and one year created by the last clause of section 101 of the Code. The said section provides as follows: "The time of such disability is not a part of the time limited for the commencement of the action; except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; *nor can it be so extended in any case longer than one year after such disability ceases.*" It may be said, that by such construction no advantage is gained in consequence of the disability provided by the statute. So it seems under the circumstances of this particular case. A state of facts can readily be conceived, by which the limitation, but for the amendment of 1870 striking out "4. Or a married woman," would be extended eleven years. I am unable to give this statute any other construction and give effect to the last clause of said section 101. I do not think the fact that no executor was appointed until 1867, prevents the cause of action from becoming barred by said statute. Section 102 of the Code provides as follows: "If a person entitled to bring an action die before the expiration of the time limited for the com

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mencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, *and within one year of his death.*" This statute applies directly to the case under consideration, and it became the duty of those who were interested in the cause of action to see that her will was proved and letters testamentary issued within the year. The case of *Bucklin v. Ford* (5 Barb., 394) is, in my judgment, clearly distinguishable from this case. In that case the cause of action accrued after the death of the intestate, and this distinction is recognized by the learned judge in his opinion. The letter addressed by the defendant to Mrs. Dunham, and which is in evidence, does not contain such an acknowledgment of indebtedness, or promise to pay, as can have the effect to revive or continue the cause of action, and thereby prevent the statute of limitations from barring a recovery. The defendant must have judgment.

NOTE.—See this decision reversed (2 Lans., 451), but see also its affirmance in the Court of Appeals.

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SEVA P. HICKOX, Appellant, v. JOHN THURSTIN, Respondent.

(GENERAL TERM, THIRD DEPARTMENT, MAY, 1872.)

In an action of trespass for damage done by cattle, with a claim for taking the cattle from plaintiff's possession after he had them in custody, as permitted by chapter 489, Laws of 1862—*Held*, error to charge that the jury might allow as damages (if they found for the plaintiff), besides the injury to crops, &c., fifty cents per head for the animals retaken.

The statute allows the sum provided for therein as compensation for the taking and also for pursuing the remedy under it.

The right to the penalty is not complete until sale of the cattle.

Accordingly it was error to assume that the plaintiff would have proceeded and the defendant would have appeared, &c.

THIS was an action brought before a justice of the peace of the town of Stockbridge, in Madison county, to recover for damage sustained by the plaintiff by reason of the defendant's cattle having entered upon his land and destroyed his corn

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and wheat, and caused other damage. Also by reason of the defendant's unlawful entry upon plaintiff's land, and seizure of the cattle, and taking them by force from the plaintiff, after they had been, as the plaintiff claimed, arrested while thus trespassing and were in his custody, pursuant to chapter 459 of the Laws of the State, passed in 1862, as amended by chapter 814 of the Laws of 1867, and by chapter 424 of the Laws of 1869. The case was tried before the court and a jury. No proceedings had been instituted at this time under the law in question; and the proof showed that the defendant took the cattle from the plaintiff's pasture, plaintiff forbidding him to do so, and declaring that he intended to advertise them. At this time the defendant offered to pay the damage which his cattle had done.

The justice charged the jury, among other things, "that if they found from the evidence that defendant's animals had been found trespassing on the lands or crops of the plaintiff, and were thereupon seized and taken into custody by the plaintiff, and were taken from the plaintiff's custody by the defendant by force and without plaintiff's consent, they might allow to the plaintiff as damages, besides the injury to the land and crops, the sum of fifty cents for each of the said animals; that being the sum allowed by law to the plaintiff for seizing and taking the same into his custody."

A verdict was rendered in favor of the plaintiff for seven dollars and ninety-two cents damages. Judgment was entered.

The defendant appealed to the County Court of Madison county, and that court reversed the judgment of the Justice's Court, upon the ground that the justice erred in his charge to the jury, and judgment was perfected accordingly; from which judgment the plaintiff appeals to this court.

The case was submitted upon printed points.

*John E. Smith*, for the appellant.

*Shoecraft & Brown*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

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MILLER, P. J. The justice was clearly wrong in charging the jury that they might allow the plaintiff as damages, besides the injury to the land and crops, the sum of fifty cents for each of the animals; that being the sum allowed by law to the plaintiff for seizing and taking the same into custody. The plaintiff claims that, inasmuch as the cattle were trespassing on his lands, he had a right to seize them; and as soon as he did so, he had a vested interest to the amount stated in the charge, which could not be defeated by the act of the defendant in taking the cattle from plaintiff's custody. This claim is founded upon the provisions of chapter 439 of the Laws of 1862, as amended by chapter 814 of Laws of 1867.

Under the second section of the act as amended, any person has the right to seize and take into custody, and retain until disposed of as required by law, any animal which may be trespassing upon premises owned or occupied by him. The third section requires that, when a seizure has been made, it shall be the duty of the person who has seized the animal to make a complaint, and contains specific provisions for the issuing of a summons, its service, hearing of complaint, and a decision; and the justice is authorized to adjudge the costs of the proceedings, and, in addition, is required to allow the party or officer making the seizure, among other sums, for every cow, calf or other cattle, each fifty cents, together with the actual damages sustained by the party by reason of the trespass, &c. The sum named cannot be collected until after a sale of the animals out of the proceeds of which the money may be realized. The fourth section of the act provides that any owner of any animal which shall have been seized may, at any time before the justice shall proceed to the hearing, demand and shall be entitled to the possession of the animal, upon the payment of the sums required to be paid, &c.; and if the owner shall not have appeared on the return day, and shall excuse such non-appearance, and shall make such demand, at least three days before the time appointed for the sale, he "shall be entitled to the custody and possession of

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such animal, upon paying one-half of the several sums above stated," &c.

If we assume that the plaintiff was justified in seizing the property, there are several serious objections to a recovery of the fifty cents a head for the cows in this action :

First. The plaintiff only became entitled to the fifty cents by a judgment of the court after a complaint had been made to the justice. Until a complaint was made, there was no lawful proceeding under the statute, and no power to adjudge that the plaintiff was entitled to the sum named. If the plaintiff had chosen to abandon his claim under the statute, and had made no complaint, then, of course, no such amount could be recovered in that form, and I think he was not entitled to it in a distinct action. The statute means that he shall be entitled to the sum provided, when and after he has acted under its provisions, as a compensation and indemnity for the seizure, and, no doubt, for the trouble incurred by seeking a remedy in this manner. Until this was done, he had no right to the amount, and had not performed the act required to entitle him to any specified amount.

Second. The plaintiff could not obtain the money until after a sale of the animals; and, until a sale was had, his right to it was not perfect and complete. As this was indispensable before the plaintiff could receive the money, it is difficult to see how a recovery can be had by an action until a sale. It is no answer to say that the damages could be recovered without a sale, and, therefore, the fifty cents for each of the animals was also recoverable because the latter sum could only be recovered by virtue of and in pursuance of the statute.

Third. As the owner, in case he did not appear, had a right to excuse his default to the justice, and, if he did so satisfactorily, to demand the cattle three days before a sale, and was entitled to the same upon the payment of twenty-five cents for each one, it cannot be claimed, I think, that fifty cents was due the plaintiff for each one of them. To entitle him to such an amount, we must not only assume

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Brink v. Gould.

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that the plaintiff could have instituted proceedings under the statute, but that the defendant would have appeared in the proceedings before the justice; or, if the defendant did not appear, that he would not have excused his non-appearance, as he had a right to do under the statute, so as to entitle him to the possession of the animals upon the payment of the smaller instead of the larger sum, and have paid the same. The amount recognized by the charge of the justice depends upon what might or would have been done in case the defendant had not taken possession of the animals. This is hypothetical, and rests upon mere conjecture. It is not enough that the plaintiff had a right to institute the proceeding, and was prevented from doing so by the act of the defendant; and it is not to be presumed, for this reason, that everything was done by the plaintiff that was necessary.

In actions of this character, the damages to be recovered must be the legal and natural consequence of the act complained of. This must be proximate and direct, and not so remote and contingent as to rest upon mere speculation. This rule was violated by the charge, and the recovery cannot be sustained. The judgment of the County Court was right and must be affirmed with costs.

Judgment affirmed.

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ADELAIDE BRINK, Respondent, v. JOEL GOULD, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, MAY, 1872.)

Where the owner of two heifers (at her residence on the premises where the heifers were) told the plaintiff, her daughter, that she might have whichever one of them she wanted, the cattle not being present, the plaintiff not living with her mother and no other possession or delivery made,—*Held*, that there was no delivery or acceptance constituting a valid gift.

Nor was the intended gift rendered valid by the subsequent joint occupation and management of a farm upon which the cattle were pastured with other stock for their common benefit.

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Brink v. Gould.

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THIS action was brought in a Justice's Court to recover the value of a cow, which plaintiff claimed to have been wrongfully and unlawfully taken by the defendant.

The defendant denied every allegation of the complaint, and the plaintiff's ownership and the right of possession. The answer also alleged that the plaintiff came rightfully into possession of the cow by virtue of a mortgage from James B. Brace, the plaintiff's father, to James B. Balch, and the sale and delivery of the cow to pay the mortgage.

The case was tried before the justice and a jury, a verdict rendered in favor of the plaintiff. The defendant appealed from the judgment to the County Court of Tioga county, and upon a re-trial there a verdict was found in favor of the plaintiff for seventy-four dollars and ninety cents. At the close of plaintiff's testimony a motion was made for a non-suit upon the ground, among others, that there was no valid gift of the property to the plaintiff, which motion was denied and the defendant duly excepted. The material facts are set forth with sufficient particularity in the opinion. A judgment was entered on the verdict. A motion was made for a new trial and denied by the County Court, and the defendant appealed to the General Term of the Supreme Court.

*Charles A. Clark*, for the appellant.

*Charles A. Munger*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. Delivery is essential to the validity of a parol gift. Without a delivery, title does not pass, and a mere intention or naked promise to give, without some act to pass the property, is not a gift. (2 Kent's C., 438.) The donor must part not only with the possession but with the dominion of the property. (Id., 439.) And the gift is only perfect and irrevocable by delivery and acceptance. (Id., 440; see also *Grangiac v. Arden*, 10 Johns., 296; *Hunting-*



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*ton v. Gilmore*, 14 Barb., 246; *Woodruff v. Cook*, 25 id., 512; *Harris v. Clark*, 3 Coms., 113.)

The principles laid down are quite familiar; and, applying them to the facts presented in the case at bar, I am unable to see how the plaintiff can recover, and am inclined to think that the court were in error in refusing the motion made by the defendant for a nonsuit. The plaintiff claimed the property as a gift from her mother. It appeared upon the trial that the plaintiff's mother was the owner of two heifers; and that in the month of February, 1867, in a conversation with the plaintiff at the mother's residence, where the heifers were, she told the plaintiff that she could have whichever one of the heifers she wanted. No response was made to this. The heifers were not present, and no designation was made by the plaintiff of either of them at that time or at any future period. The plaintiff did not live at home, but was away teaching school, and did not act to take possession of the heifer claimed to have been given. The plaintiff neither received nor did her mother deliver the property to her at the time the alleged gift is claimed to have been made. There was no acceptance and delivery, as the law requires; and there is no testimony in the case from which the inference may be drawn that the plaintiff selected and accepted the property in controversy. The subsequent acts do not, in my opinion, establish or tend to prove any facts which obviate the difficulty. The plaintiff was soon afterward married; and, in the month of March following, her husband and father and mother made a contract for a farm, to which the father and mother removed with the two heifers and other stock which had remained in their possession; and about the first of April the plaintiff and her husband also came there. The farm was then worked by the plaintiff's husband and her father and mother jointly; and in April, 1868, the plaintiff's father executed a chattel mortgage upon the heifer and other property under which the defendant claims title, and took the same in the month of January, 1869. During the period that the plaintiff and her husband

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were in possession of the farm, with her father and mother, she exercised no distinct act of ownership over the property, nor made any special claim of title to it. It was then the same as other stock; and there is no evidence of a delivery of the property to her alone, or that she specially claimed it. Certainly, there was no such delivery as the law requires to establish a gift. There is, in fact, nothing in this case to show any change in the possession of the property after the alleged gift, except the fact that plaintiff and her husband worked the farm in conjunction with her father and mother. This is not sufficient to make out a valid gift, or to raise any question of fact for the jury upon that subject.

Some other questions are made; but as there was error, for the reasons stated, in refusing the motion for a nonsuit, it is not necessary to discuss them.

Judgment and order appealed from reversed and a new trial granted, with costs to abide the event.

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JAMES FARLEY, as Administrator of JAMES FARLEY, Jr., v.  
JOHN McCONNELL et al.

(GENERAL TERM, THIRD DEPARTMENT, MAY, 1872.)

It will be assumed, in favor of an administrator's bond, which requires obedience to all orders "of the county judge," that no provision has been made (Const., art. 6, § 15) for a separate surrogate in the county. The court will take judicial notice of the population of counties and the public officers therein.

The administrator's bond is not defective, because the "county judge" is named in it, in counties where the judge is also surrogate.

Or, if defective, the intent being manifest, the court will relieve against it.

It is sufficient if the bond conform substantially to the statute.

In the absence of proof it will be assumed that the surrogate made the proper examination as to the manner of the intestate's death; and this is so, although the petition does not affirmatively show that fact.

The statute which requires the surrogate to examine the applicant for the letters, as to the time, &c., of death, is merely directory. (Per MILLER, P. J.)

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Letters of administration being in due form and regular upon their face, confer authority upon the administrator and are not questionable in a collateral action.

THE action was for negligence, and tried at the Chemung County Circuit in October, 1871.

The defendants were contractors for the construction of a sewer through Conongue street, in the city of Elmira, in one of the catch-basins of which the plaintiff's son, a little boy about six years old, fell and was drowned. Objections were made and exceptions taken to the admission of the petition, bond, &c., on the appointment of the plaintiff as administrator, as stated in the opinion. The jury rendered a verdict in favor of the plaintiff, for \$500 damages.

The exceptions of the defendants were ordered to be heard in the first instance at General Term.

*Smith and Hill*, for the plaintiff.

*James L. Angle*, for the defendants.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. The defendant's counsel presents two objections to the validity of the plaintiff's appointment as administrator:

First. That the bond was defective, inasmuch as it is conditioned that the plaintiff, as administrator, shall obey "all orders of the county judge of Chemung county" instead of the "surrogate" of that county.

Second. That the petition for letters of administration does not affirmatively show that the petitioner was examined touching the manner of the death of the intestate.

As to the first objection, the fifteenth section of the sixth article of the Constitution of the State provides that "the county judge shall also be surrogate of the county; but, in counties having a population exceeding 40,000, the legislature may provide for the election of a separate officer to be surrogate," &c. The county judge is primarily *ex officio* sur-

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rogate, and, I think, until the contrary be made to appear, it must be assumed that he was surrogate, as the Constitution provides, and that the county of Chemung was not within the exception. But as the court have the right, I think, to take judicial notice of the population of counties and of their public officers, it follows that the county judge was in fact such surrogate who issued the letters, and whose orders the administrator was bound to obey. Such being the case, the bond was not defective, and in effect was the same as if the surrogate had been named in a county where that office was filled by another officer and was distinct and separate from the office of county judge.

Even if there was a mistake in the insertion of the wrong officer, as the intention is manifest the court will relieve against it. (*Wiser v. Blachly*, 1 John. Ch., 607.) A strict and technical conformity to the statute is not essential to the validity of the bond, and it is sufficient if it conform *substantially* thereto, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit it is given. (2 R. S., 556, § 33; *Supervisors of Schoharie v. Pindar*, 3 Lans., 8, 11.)

As to the second objection, it is, I think, without any foundation. The statute provides that, before any letters of administration shall be granted, "the fact of such person's dying intestate shall be proved to the satisfaction of the surrogate, who shall examine the person applying for such letters on oath, touching the time, place and *manner of the death*," &c. It will be noticed that the statute does not require that the petition should show the "manner of the death;" and for anything that appears such examination may have been had by the surrogate, and in the absence of any proof to the contrary, as every intendment is in favor of a judgment, the legal presumption is that the surrogate performed his duty. I am also inclined to think that the statute in this respect is merely directory, and a failure to conform to its provisions is not a fatal objection to the validity of the letters issued.

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Rochester, Nunda and Pennsylvania Railroad Co. v. Cuyler.

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Independent of the considerations presented, I am also of the opinion that neither one of the objections is of any avail, because the letters of administration being in due form and regular upon their face, they were sufficient to confer authority to the plaintiff and cannot be questioned in a collateral action. (*Vanderpool v. Van Valkenburg*, 2 Seld., 190; 7 Paige, 397; 3 B. Ch., 281.) As the letters have been issued by an officer who had jurisdiction, they must be considered as valid until set aside by a competent tribunal, and are not open to an impeachment in a collateral proceeding. They were *prima facie* sufficient, and cannot be disregarded without a judgment of a competent court declaring that they are invalid.

No error is manifest, and judgment must be ordered on the verdict for the plaintiff, with costs.

Judgment accordingly.

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THE ROCHESTER, NUNDA AND PENNSYLVANIA RAILROAD COMPANY, Appellant, v. GEORGE M. CUYLER and others, Commissioners, &c., of the Town of Leicester, in the County of Livingston, Respondents.

SAME, Appellant, v. COMMISSIONERS OF MOUNT MORRIS, Respondents.

(GENERAL TERM, FOURTH DEPARTMENT, 1872.)

Commissioners appointed, pursuant to statute, to subscribe for stock in a railroad company, on behalf of a town, have no authority to bind the tax-payers of the town, except that which is derived from the petition presented to the county judge for leave to make such subscription, and from the statute which authorized such petition.

A subscription to a different company than that designated by the petition or for a larger amount of stock than that authorized thereby, is void.

*Held*, accordingly, that commissioners appointed to subscribe to the stock of a certain railroad company had no power, and the court would not compel them to subscribe for stock of a company formed by the consolidation of that company with another under a different name and having different termini.

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Rochester, Nunda and Pennsylvania Railroad Co. v. Cuyler.

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The facts are fully stated in the opinion.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The Rochester, Nunda and Pennsylvania Railroad Company applies to this court for an order requiring the commissioners appointed by the county judge of Livingston county to subscribe for stock in the name of said town of Leicester, and to issue bonds in payment of the same to the amount of \$40,000, and to deliver the same to said company or deposit the same in the Genesee River National Bank.

The papers read on the motion disclose the following state of facts: On the 12th of January, 1872, the northern extension of the Rochester, Nunda and Pennsylvania Railroad Company was duly incorporated under the general railroad act passed April 2d, 1850, with a capital stock of \$900,000.

In February, 1872, a petition signed by a majority of the tax-payers of Leicester, whose names appeared on the last assessment roll of said town, signed a petition addressed to the county judge of said county of Livingston, praying the appointment of commissioners to subscribe for \$40,000 of the stock of said railroad company and to issue bonds in payment of the same. The petition contained the condition that said bonds should not be created or issued by said town of Leicester until so much of the Northern Extension railroad running through the town of Leicester and connecting the village of Mount Morris with the Central railroad in the town of Caledonia shall be completed and of the Central gauge.

Bartlett L. Cone, George M. Cuyler and H. W. Seller were appointed commissioners to carry into effect the prayer of said petition. After such appointment was made the said Northern Extension Railroad Company was consolidated with the Rochester, Nunda and Pennsylvania Railroad Company, and the Rochester, Nunda and Pennsylvania Extension Railroad Company, and the new company formed by such consolidation was called the Rochester, Nunda and Pennsylvania Railroad Company

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The commissioners appointed by the county judge refuse to subscribe for stock or issue bonds on the grounds, amongst others, that the company in which the petitioners authorized a subscription for stock no longer exists, and they (the commissioners) have never been authorized to subscribe for stock in the new company.

The commissioners have no authority to bind the taxpayers of their town, except such as is derived from the petition and the statute that authorized it to be signed and presented to the county judge.

The power thus given is to subscribe for the stock or bonds of a railroad company named in the petition, and to an amount specifically designated. A subscription in a different company or for a larger amount is simply void.

The tax-payers are presumed to have informed themselves of the feasibility of the route over which the road for whose stock or bonds they are desired to subscribe is to be laid, the business that it will probably obtain, the character of the directors, and the benefits, pecuniary or others, that will result from the investment.

It cannot be known that consent would have been given to the subscription for stock or bonds in a company located upon a different line or with different directors or having different termini.

To permit the commissioners to subscribe for stock or bonds in a different company, other than the one designated in the petition, is to disregard wholly the wishes of the taxpayers, and to bind them by a contract into which they never intended to enter.

No subscription having been made in behalf of the town of Leicester before the consolidation of the companies which form the new or consolidated company, it is not bound by the agreement of consolidation or affected by the laws passed to confirm and enforce it.

Upon no principle can the commissioners be compelled to subscribe for stock or bonds in the new company.

The motion must be denied, with ten dollars costs.

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Ellis v. Village of Lowville.

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BENJAMIN R. ELLIS, Appellant, v. THE VILLAGE OF LOWVILLE,  
Respondent.

(GENERAL TERM, FOURTH DEPARTMENT, 1872.)

The trustees of the village of Lowville, incorporated under the general act for the incorporation of villages, have no power under that act to appropriate the moneys raised for highway purposes to making or repairing sidewalks in that village.

A resolution passed by the inhabitants of that village, authorizing the building of a sidewalk, which specifies no sum to be raised, is of no validity, as such a resolution is expressly prohibited by the thirtieth section of the general law.

*Held*, however, that the trustees being made commissioners of highways by the amendment to the charter in 1866 (chap. 224), they are bound to make repairs out of the highway fund to a sidewalk where its condition is such as to endanger the safety of travelers; and the village is liable for the omission to make such repairs to any person injured thereby.

And the liability of the village is affirmatively established by proof of the charter which imposes upon the trustees the duty of raising moneys for highway purposes, as it will be presumed that they discharged their duty.

The *onus* was upon defendant to show that they had no funds.

In 1854 the village of Lowville was duly incorporated under the general act, passed in 1847, regulating the incorporation of villages.

By section 28 of that act (3 Stat. at Large, 794), the electors of a village, at a meeting duly called, are authorized, by resolution, to direct the trustees to raise by tax, upon said village, moneys for the following purposes, amongst others:

7. For the necessary advances for making and repairing sidewalks, in cases where those required to make or repair them shall neglect or refuse to do so.

8. For constructing and repairing crosswalks.

14. For highway purposes, where such village shall be a separate road district; and no other mode shall be prescribed by law for raising money therein for highway purposes.

By section 29 it is declared that no tax shall be voted to



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be raised at any such meeting, unless the notice for holding it shall specify the amount and object of the tax.

By the thirtieth section the resolution adopted at the meeting must specify the amount of the tax, and the objects to which the money raised is to be applied.

By section 34 the money raised for any specified purpose cannot be applied to another.

By section 43 the village is declared incapable of contracting a debt, and not liable for debts contracted by any of its officers.

By section 45 the electors, at any meeting duly called, may, by resolution, direct the trustees to cause sidewalks to be made or repaired on any road therein; and the resolution must specify the place where and the material with which such walk shall be made or repaired; and to render valid such a resolution the notice, by which the meeting is called, must state that such a resolution will be proposed.

By section 46 the expense of making or repairing a sidewalk is a lien on the land in front of which it is laid; and the trustees are required to give the owner, if a resident of the town, notice of the time and manner in which the work is required to be done.

By section 47, if not done in conformity to the notice, or if the owner is not a resident, the trustees are authorized to do the work, and to issue a warrant for the collection of the expenses.

And if the collector is unable to find property out of which to certify the tax the land itself may be leased.

The charter of Lowville was amended in 1862 by chapter 77 of the Laws of that year. The village, together with certain highways leading thereto, were declared a separate road district; and the trustees were made commissioners of highways therein, and vested with all the powers of commissioners of highways of towns.

This act was amended in 1866 (chapter 224 of the Laws of that year).

Section 2 of that act directs the trustees, within twenty

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days after the annual election in said village, to make out a tax, and according to the statute for raising highway taxes by commissioners of highways, except that such taxes shall be paid in money, estimating a day's work at one dollar.

They are required to issue a warrant to the collector, requiring him to collect the same and pay it to the treasurer.

Every male inhabitant, of the age of twenty-one years and upward, is required to be assessed one dollar for one day's labor, to be inserted in said warrant.

The trustees, in assessing the highway tax, are to be governed by the last assessment roll of the town of Lowville.

The moneys raised for highway purposes are to be applied only to the same purposes that highway labor and commutations thereof may be used.

The manner in which the highway taxes are assessed in towns is regulated by the Revised Statutes. (1 Stat. at Large, 465, §§ 21, 22, 23.)

Section 21 requires each overseer of highways to prepare a list of the names of the taxable inhabitants in his road district who are liable to work for the highway.

The commissioners are required (§ 22) to make out a descriptive list of all non-resident lands, and to annex thereto the valuation placed upon them in the last assessment roll of the town.

The lists prepared by the overseers are (§ 23) to be delivered to the commissioners.

They are then (§ 24) to ascertain the number of days' work to be assessed, which is to be at least three times the number of taxable inhabitants, to which is to be added one day for a poll tax, against each taxable male inhabitant of twenty-one years of age and upward, except idiots, &c. &c.

The residue of such days' work is required to be assessed on the real and personal property of every inhabitant of the town, as the same appears on the last assessment roll of the town. And if, after such apportionment, there shall be a deficiency in the number of days' work determined by the

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commissioners, such deficiency shall be assessed on the property of the inhabitants.

On the easterly side of State street, in the said village of Lowville, and in front of a store occupied by one Jones, there was erected, seven years since, a plank sidewalk within the bounds of said street, which had become out of repair by reason of the removal or destruction of one of the planks thereof, leaving a hole about a foot wide and two inches deep, and several feet in length.

In the evening of the 1st October, 1869, the plaintiff was coming out of the store of said Jones and stepped into said opening and sprained his ankle; by reason whereof he suffered pain, and was put to expense, and was unable to labor for some time.

For this injury the action was brought.

On the trial the plaintiff proved the incorporation of said village, and the acts amending its charter, the passage, by the inhabitants at a meeting of those entitled to vote taxes, of a resolution "to build a sidewalk on either side of State street six feet wide (where necessary)," the defect in the sidewalk, and the injury caused thereby.

The referee ordered judgment, dismissing plaintiff's complaint, with costs.

Present—MULLIN, P. J., JOHNSON and TALCOTT, JJ.

MULLIN, P. J. The trustees have no power, under the charter, to appropriate the moneys raised for highway purposes to making or repairing sidewalks in said village. The moneys for sidewalks must be voted by the inhabitants; those for the highways are to be raised by a tax on the taxable inhabitants.

The resolution that was passed by the inhabitants is of no validity. It specified no sum to be raised; and without such specification it is declared, by the thirtieth section of the general law, to be void.

Unless, therefore, the trustees are liable because they are

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commissioners of highways, or the repair of the walk could be legitimately done out of the highway fund, the corporation was not liable and the judgment should be affirmed.

The amendment of the charter of 1866 makes the trustees commissioners of highways; and for the neglect of such trustees to perform their duties the corporation is liable. (*Cases cited infra.*)

It is the duty of commissioners of highways to keep them in repair, so that they do not become a public nuisance.

But this liability attaches on commissioners in towns only when they are shown to have funds in their hands applicable to such purpose, and to which it is their duty to apply them. (*Garlinghouse v. Jacobs*, 29 N. Y., 297; *Hover v. Commissioners of Florida*, 44 id., 113.)

But in incorporated cities and villages, whose common council or trustees are vested with the powers of commissioners of highways, the corporation is liable, for the omission to keep the streets in repair, to any person injured thereby, although they have no funds applicable to such use.

This was directly held in *Weet v. The Village of Brockport* (16 N. Y., 159), in note to case of *Conrad v. The Village of Ithaca*, *Hiscock v. Village of Plattsburgh*, *Hines v. City of Lockport* (5 Lansing, 16; S. C., 60 Barb., 378).

To subject the corporation to liability for neglect, the duty must be imperative, and they must not be forbidden to raise, in some legitimate way, the money with which to do the work.

If the work omitted in this case is to be considered as the repair of a sidewalk, within the meaning of the sections of the general law relating to making and repairing sidewalks, they are not liable.

They are not bound to make or repair a sidewalk until a tax is voted for the purpose.

The provisions of the charter as to sidewalks seem to proceed upon the assumption that they are, in some way, separated from the street, and made, in part at least, of different material.

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When a sidewalk, as thus defined, is to be made or repaired, a tax must be voted.

Let us suppose that a flood comes and washes away the walk and the earth on which it rests, so that an excavation is made, dangerous to the life or limb of any person who should accidentally fall into it, may the trustees omit to fill up the excavation until a village meeting is called and tax voted?

The space on which the sidewalk lies, if within the boundary of the street, is as much a part of the highway or street as the part over which teams pass; and no good reason can be assigned why the duty is imperative as to one part of the highway and not as to another part. (*Graves v. Otis*, 2 Hill, 466.)

The trustees in this case, when they found the plank missing, might not be authorized to purchase plank out of the highway moneys in their hands with which to repair the walk, but they could fill the hole with earth as they could a similar hole in the part traveled by teams, and thus protect foot passengers from injury.

But it seems to me the trustees had the same authority to use the highway money to purchase plank to repair the walk that they would have to purchase it to repair sluices over streams crossing highways.

The distinction I design to make is between repairing in order to make a walk safe, that would otherwise be dangerous, and repairing one whose condition involves no danger to the public.

It is the duty of the trustees to make the walk, when it is part of a public highway, safe; but it is not their duty to make repairs on walks when there is no danger to the traveler if it is left unrepaired.

It is essential, in order to subject the corporation to liability, that they should be shown to have funds in their hands applicable to the work. The charter shows they have power to raise moneys for highway purposes; and it is presumed they discharged their duty. This is all the plaintiff could prove. The defendant had the means of showing they

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Raynor v. Selmes.

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had not funds, and the proof of the negative is, under such circumstances, on them.

This was held in the case of *Hines v. City of Lockport* (*supra*).

The judgment should be reversed and a new trial ordered, costs to abide the event.

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## WILLIAM H. RAYNOR v. REEVES E. SELMES.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1873.)

Upon a mortgage foreclosure, the premises having been sold, the title to the property proved defective by reason of the owners of the equity of redemption not being made defendants; thereupon the sale was vacated by order of the court, and a second sale ordered after bringing in the proper parties. The referee who made the first sale returned, to the purchaser, all of the deposit made at that sale, excepting his fees and expenses.

*Held*, it not appearing that the plaintiff or his attorneys were guilty of negligence in not making the proper parties, the purchaser upon the first sale was entitled to be refunded, out of the surplus moneys arising on the second sale, the balance unpaid him upon his deposit, with interest thereon, and the amount paid by him for services of counsel and official searches in investigating the title.

*So ordered*, however, without prejudice to a motion by the owner of the equity of redemption, to compel the plaintiff to refund such moneys. *Morris v. Mowatt* (2 Paige, 586) held applicable and followed.

The rules governing the rights of purchasers and of referees upon sales under judgments of mortgage foreclosure, where the title is defective, stated by INGRAHAM, P. J.,

THIS was an action for the foreclosure of a mortgage.

A decree of foreclosure was made on the 30th of March, 1872, and on the 20th April, 1872, the premises were sold by Gratz Nathan, referee, to Henry Welsh; the purchaser paid the referee \$390, being ten per cent of the purchase money, and fifty dollars auctioneer's fee, making in all \$440. The purchaser rejected the title, on the ground that Shepherd F. Knapp, as receiver, &c., the owner of the equity of redemption, was not made a party to the suit, and demanded

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from the referee the moneys paid him. The referee retained out of said moneys \$198 for his fees and expenses.

The purchaser also expended eighty-six dollars and forty-eight cents for searches, and the services of his counsel for searching the title of the property were worth seventy-five dollars.

Subsequently, the judgment of foreclosure was vacated on motion of the plaintiff *ex parte*, and the proceedings amended by making Shepherd F. Knapp, receiver, the owner of the equity of redemption, a party, a new judgment of foreclosure entered, the property resold and purchased by the plaintiff.

The surplus in the hands of the referee on the second sale was \$1,200.

The purchaser, under the first sale, thereupon moved for an order directing the referee, under the second sale, to pay him out of the surplus \$198, retained by the referee under the first sale, eighty-six dollars and forty-eight cents expended for searches, and seventy-five dollars counsel fee.

The motion was denied and this appeal is brought from the order denying that motion.

Present—INGRAHAM, P. J., BRADY and LEARNED, JJ.

INGRAHAM, P. J. Where the title to premises sold under foreclosure of a mortgage proves defective, there can be no doubt but that the purchaser is entitled to a return of the ten per cent paid by him on the purchase; as well as the expenses he has been put to in examining the title and interest on his deposit. The money paid to the referee is so paid as a deposit to insure the completion of the contract, and the referee has no right to use it for the expenses until the sale is completed. The referee has no claim on it for his expenses or fees, and must return it to the purchaser in full. He, however, is not liable for the auctioneer's fees or interest. They must be obtained in some other way. Where the defect in the title existed previous to the foreclosure, and the property is afterward sold subject thereto, if there should be

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a surplus, there is no reason why such expenses and interest should not be paid out of the surplus money. The fault is not chargeable either to the purchaser or the plaintiff. In such a case the expenses of the first sale of the purchaser should be paid in the first instance out of the purchase-money on the second sale. The purchaser is protected because he cannot receive what was agreed to be sold, and the referee should be protected because, as an officer of the court, he has been acting under its direction.

Where, however, the defect in the title is caused by the negligence of the plaintiff or his attorney, there is some doubt as to the propriety of throwing such expenses on the owner of the equity of redemption.

In *Morris v. Mowatt* (2 Paige, 586), which case the justice who made the order appealed from said was not applicable, the defect was in omitting to make judgment creditors parties, and in consequence the lien of the judgments remained.

The chancellor discharged the purchaser and ordered the costs and expenses to be paid out of the surplus. He said, "as all parties have acted in perfect good faith in relation to this sale, the expenses must be paid out of the fund hereafter to be raised if a second sale takes place." If no other way is provided for the payment, the charge must fall on the complainant personally.

In the present case the defect was in not making the receiver of the bank a party. The equity of redemption was in him as receiver. No reason is given why he was not made a party. Probably when the action was commenced his appointment was unknown.

I see no difference in these cases. It was necessary that an application to the court should be made to add these parties, and, if so, the plaintiff should have been required to pay these costs as a condition of allowing the amendment. If the order was *ex parte*, the defendant should have moved the court to make such payment a condition of the amendment. If we follow the case in 2 Paige, this motion should have



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been granted, and the referee's expenses and those of the purchaser over and above the deposit should be paid out of the surplus moneys.

If the receiver thinks the plaintiff should pay these expenses he may move the court for such an order. That relief cannot be given on this motion.

The order should be reversed and the motion granted, with costs, and without prejudice to a motion by the receiver to compel the plaintiff to refund such moneys, if he is so advised.

Order reversed.

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STEPHEN FORMAN and others, Appellants, v. O. W. SMITH,  
Executor, &c., and others, Respondents.

7L 448  
89 Mis<sup>2</sup> 66

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

To enable a person to dispose of his property by will, it is not enough that he should be found to be possessed of some degree of intelligence and mind; he must, in addition, have sufficient mind to comprehend the nature and effect of the act he is performing, the relation he holds to the various individuals who might naturally be expected to become objects of his bounty, and to be capable of making a rational selection among them. (Per MILLER, P. J.)

An infirm man, aged eighty-two years, whose mind was impaired, made a will in favor of the family of a son who, for a time, had been a favorite with him, and excluded other children, provided for in prior wills. The will was contested; and the evidence, among other matters, tended to show that the son stood in confidential relations to his father, as his business adviser, and went to live with him less than a month prior to the execution of the will, exercising a controlling influence over him; that other children were excluded from the testator's presence, or not permitted to see him alone, and their conduct and language respecting him presented to him in a most unfavorable and obnoxious light. The evidence was conflicting on the essential points of exclusion, undue influence, &c., and the surrogate admitted the will. *Held*, that his decree should be reversed and a feigned issue awarded.

THIS is an appeal from the decision of the surrogate of Delaware county, made on the 22d of November, 1870,

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admitting to probate an alleged will of Henry Forman, deceased. The probate was contested by all the heirs, except Alexander Forman, a son who is the principal legatee and devisee, on the ground of the incapacity of the deceased to make a will, and also that it was not his free and voluntary act and deed, but the result of undue influence.

The facts necessary for a proper understanding of the case appear in the opinion.

*William Gleason*, for the appellants.

*Palmer and Smith*, for the respondents.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. The testator died in November, 1868, aged eighty-two years. In the latter part of June or July, 1864, as the testimony shows, he made a will which is not produced, and the contents of which are not fully in evidence, although it appears he devised one of his farms to his only daughter Mrs. Benson, wife of Simon Benson, of Erie, Pennsylvania.

On the sixth of August following he executed another will, by which he devised all his estate to his wife, who was then living, during her life and making her an executrix. And upon the decease of his wife he distributed his estate among some members of his family. The farm which he had devised to his daughter, Mrs. Benson, was given to his grandson, a son of Alexander Forman, and to Mrs. Benson was bequeathed a legacy of \$800. He also devised the homestead to his son Alexander, subject to the legacy of \$800 to Mrs. Benson, and gave a legacy of \$400 to one of the daughters of his deceased son Archibald.

On the 22d of May, 1865, he executed a codicil to his will, in which he bequeathed to his son Gabriel \$1,000, to his son Stephen \$800, and to a son of Gabriel \$500. Also to two of the daughters of Archibald \$100 each. All of these were not named in his will of August 6th, 1864.

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On the 18th of May, 1867, he executed the will now in controversy, and by this he entirely discarded his two sons Gabriel and Stephen and his grandson Gabriel, and made the wife of Alexander his residuary legatee. Alexander's family, therefore, by this will have all his estate, which is supposed to be of the value of \$12,000, except \$800 which is bequeathed to Mrs. Benson, and \$500 to the children of his deceased son Archibald.

The wife of the testator died on the 5th day of April, 1867. His son Alexander lived near his father, and for some years prior to this time had been evidently a great favorite; exercised considerable influence over him, and it appears that he was his confidential adviser as to business matters. Soon after his mother's death, and on the 15th of April, 1867, he entered into an agreement with his father by which the latter leased Alexander the farm and personal property, and Alexander agreed to provide and take care of him as long as he lived. He took possession under this lease, and remained there until his father's death. The son of the testator, Gabriel B., lived two or three miles from his father, and his son Stephen, who was a physician, three-fourths of a mile, and the children of Archibald (who up to the time of his, Archibald's) death in 1858, was a favorite son of the testator, lived one-quarter of a mile from the testator on a farm owned by him, which he had in his first will devised to Mrs. Benson, and in his last will to Alexander's son.

According to some of the testimony the two sons, Stephen and Gabriel, were not on very good terms with the father, and unfriendly feelings existed between them and Alexander. There is also evidence to show that Alexander, who resided three-fourths of a mile from his father, and on a farm of the latter, prior to the death of Archibald, was in open hostility to the deceased. And he, as well as the other two brothers, at times used very abusive language in regard to their father. Alexander, as some of the witnesses swear, while his brother Archibald was alive, said that his father was not capable of taking care of his property and was giving it all to Archi-

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bald. It also appears from some of the testimony, that the deceased's daughter, Mrs. Benson, had differences at one time with her parents which caused unpleasant relations between them. This general statement of the situation of the parties toward their father, which is mainly derived from their own testimony, which, it is proper to say, is not entirely harmonious, as the opposing parties distinctly deny statements made by each other, furnishes some idea of the unfortunate and discordant state of feeling which existed among the members of the testator's family. And it is by no means strange or remarkable that amid so much strife and contention, suspicion, jealousy and selfishness, if the deceased, then at an advanced age, prostrated by disease and overwhelmed by physical infirmities, should have been induced to make a disposition of his property which would do great injustice to some of those who had claims upon him, and who, as his nearest kindred and blood, would naturally be the lawful heirs of his estate.

The will of the testator of May 18th, 1867, which was admitted to probate, is contested upon two grounds :

First. That the testator was incompetent from disease and *dementia* to make a valid will.

Second. That the will was procured by undue influence and restraint, over-persuasion, misrepresentations and gross falsehoods.

A great mass of testimony was taken before the surrogate, and is embraced in the return relating to the two propositions above stated, which I have carefully perused, and it cannot be denied that there is considerable evidence to establish that the testator was not of sufficient capacity to render him competent to make a valid disposition of his estate. The doctrine is well settled, that to enable a person to dispose of his property by will, it is not enough that he should be found to be possessed of some degree of intelligence and mind. He must in addition have sufficient mind to comprehend the nature and effect of the act he was performing ; the relation he held to the various individuals who might naturally be

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expected to become objects of his bounty, and to be capable of making a rational selection among them. (*Delafield v. Parish*, 25 N. Y., 9, 105.)

The testator was for many years in a feeble state of health, and his mind appears to have been somewhat affected and impaired. A large number of witnesses testify that the testator had not sufficient capacity to comprehend and understand ordinary business transactions; and a larger number, I understand, including his pastor, his family physicians and the subscribing witnesses to the will, give evidence which establishes or tends to prove his competency. The testimony of one of the subscribing witnesses is quite strong as to his understanding the nature of the business transacted. He swears that the will was carefully read over to him, item by item, and that he assented to the various provisions which it contained.

The fact that this will disinherits most of the nearest kindred and relatives is a very strong circumstance to show that the testator was not in possession of all his faculties, so as to appreciate what he did, within the rule laid down in *Delafield v. Parish*; but I am not fully satisfied and convinced that he was entirely incompetent and disqualified to make a disposition of his estate, provided he was not improperly controlled by the influence of those by whom he was surrounded.

The question whether undue influence and improper restraint was exercised is more embarrassing; but after a careful examination of the evidence and full deliberation, I am inclined to think that probate of the will should have been refused on this ground if no other. The law carefully guards the aged, infirm and weak-minded against the insidious and persevering efforts of relations who may attempt improperly to control their judgment in the disposition of their property, to the detriment, injury, and sometimes the disinheritance of those who have equal claims upon the bounty of the deceased under ordinary circumstances. It is designed to protect this class of persons, where the facts indi-

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cate, as in this case, that the testator is under the immediate control of a single member of his family, to the exclusion of others, and by reason of undue and improper restraint; or, as often happens, by misrepresentation, falsehood and over-persuasion, skillfully employed, he is not permitted to enjoy a free, unrestrained and unbiased exercise of his own volition in making a testamentary disposition of his estate, and his honest intentions are defeated to promote the interest of some favorite, at the expense and frequently to the exclusion of the remainder of his children.

The fact that Alexander Forman, a son of the testator, exercised a controlling influence over him is established beyond any question. There is also some evidence to prove that Alexander sought to keep the other children of his father from seeing, conversing or having any friendly intercourse with him, except in the presence of himself or some one or more members of his family. Passing by many circumstances which the testimony discloses, there is some evidence to show that after the deceased had sent for his daughter, Mrs. Benson, to come and see her mother during her last illness, he was induced to countermand the request; and when she did come afterward by special invitation, that she only obtained a private interview with her father after considerable opposition. There is also proof that the deceased had been wrongly informed and induced to believe that one of his sons had employed the most abusive language toward him, and threatened to burn his house, and made fun of his mother while she lay in her coffin.

If such statements were made to the deceased, it is not difficult to see how his mind may have become imbued with prejudice toward one who had thus disregarded the obligations due from a son to a parent.

It is true, it is denied that any such statements were made; but the questions as to their truthfulness, as well as other matters in regard to which there is much contradiction in the testimony, are a fair subject for investigation and determination upon a trial before a jury.

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In this class of cases, a will is set aside or refused probate on the ground that it is not an honest will, that it does not reflect the unbiased intent and wishes of the testator or testatrix, but, on the contrary, has been extorted or procured from the deceased, in the weakness and imbecility of old age or disease, by artifice, deceit, imposition, or by persistent importunity, amounting to a species of coercion or moral duress. (See *Kinne v. Johnson*, 60 Barb., 69-75), and authorities cited.)

The fact that the deceased was, as the testimony shows, very much indebted to his son Alexander for attention to his business, for acts of kindness and affection, and regarded him as his confidential adviser, is a very important circumstance upon the question of undue influence. Living as the deceased did in his son's family, and dependent upon him for many comforts and enjoyments at his advanced age, he was exactly in a position to be influenced, imposed upon or intimidated.

The very fact also, that a large portion of property of a deceased person is devised and bequeathed by his will to one standing in a fiduciary relation to the testator, is a strong circumstance to awaken suspicion, if it does not furnish ground for a presumption, that undue influence was exerted or fraud practiced upon the testator in procuring the execution of the will. In *Kinne v. Johnson (supra)*, and as was said in the case cited, "in such case proof should be given to satisfy the court that such position and relation was not abused, and that the will was the clear and free act of the party, unaffected by any improper influence." The burden of establishing undue influence and imposition usually rests with the party who alleges it. While fraud is never presumed and must be established by evidence, it is established when facts are proved from which it results as a necessary inference. And when such evidence is furnished, the burden of repelling the presumption which arises is upon the party who is charged with the fraud. (*Tyler v. Gardner*, 35 N. Y., 504.)

Direct proof of undue influence can never, or at least but rarely be given, and ordinarily it must be established by cir-

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cumstances and inferences, to be drawn from facts and the character of the transaction. These facts could scarcely be known to the subscribing witnesses, who are simply called to attest to the execution and not to prove what usually would be beyond their knowledge. (See *Sears v. Shafer*, 2 Seld., 272; *DeLafield v. Parish*, 25 N. Y., 95.)

It also raises a violent presumption of fraud and undue influence, where a will executed by an old man differs from his previously expressed intentions, and if it is made in favor of those who stand in confidential relationship to the deceased, which should be overcome by satisfactory testimony. (*Lee v. Dill*, 11 Abb., 214.) MORGAN, J., in the case last cited, after laying down the rule that the decedent, who is old and infirm, should be free to choose upon whom he should bestow his bounty, and it should be shown that he was in an independent position, entirely removed from importunities of those who are named as principal beneficiaries, and that he was informed and understood what he was about, observes: "It should not be procured by one or two members of the family while the other members were beyond the paternal roof, and entirely ignorant of what was doing in their absence."

The principles which are established by the cases last cited have a direct bearing upon the facts presented in the case at bar.

As we have seen, the case shows that, long prior to and several years previous to the execution of this will, the testator had made a different disposition of his estate, and in doing so had provided for most if not all his nearest kindred. He thereby recognized their claims upon him, and that he then retained toward them the affectionate regard which was due to the ties of consanguinity which bound them together.

A few days after the decease of his wife he executed a lease to his son Alexander, who had so long been a favored child and his confidential adviser. About one month after the memorable interview with his only daughter, which has been referred to, after he had been, as some of the testimony shows, informed that one of his sons had employed the most



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severe and threatening language in regard to him, and treated his deceased wife's memory with derision and great disrespect, and, as is fairly to be inferred, after he had reason to become prejudiced against several of his nearest kindred; at the house of their son, with whom he lived; with that son and his family at home and around him, he executes the will in question. Every other member of the family was ignorant of the proceeding and beyond the paternal roof; not one of them is advised and consulted about it, unless it was the son who with his family were the principal beneficiaries.

No personal friend was called to advise about it, and no one present or at hand besides the draughtsman, the subscribing witnesses, one of whom (a hired servant of Alexander) was only in the room for a few minutes. The whole proceeding is contrary to the usual practice which governs cases of this character, and bears some indications of improper influence and restraint.

True, there is no positive proof that Alexander personally was a direct participator in the business of procuring so great a change in the testator's previous intentions, but the circumstances are such as to create a presumption which, I think, he is called upon to rebut. The burden of proof is upon him to show that his position was not abused.

I have omitted to advert to or discuss many facts which the case presents, which have a direct bearing upon the question considered, which are disputed; but those which are conceded to be true or established by disinterested witnesses, to which I have particularly referred, are quite sufficient to authorize the interference of the court.

There is much to criticise, if not to condemn, in the conduct of most of the parties to this controversy, which, with the conflicting testimony they have given as to many leading facts, presents questions which are peculiarly appropriate for the consideration of a jury upon a trial at the circuit.

Even if it may be urged that the surrogate's decree is not entirely erroneous, I think that a case is presented where there is at least great doubt as to the correctness of his

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decision, and where it is not entirely clear that he has not erred. Under such circumstances, and when the case is close and doubtful, it is eminently proper and in accordance with authority to present it to the consideration of another court and jury. (See *Ean v. Snyder*, 46 Barb., 234.)

The order admitting the will to probate must, therefore, be reversed, and an issue awarded to try the questions involved at the next Circuit Court in Delaware county. The costs of this appeal should be paid out of the estate.

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JAMES A. WEED, Respondent, v. THE SCHENECTADY INSURANCE COMPANY, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

A policy of insurance provided that an application or survey, if referred to therein, should be considered part of the agreement and a warranty. The insured sued for the insurance, after loss had occurred, and asked to have the policy conformed in a single particular to the application, which was not so referred to, and the agreement of which it was the basis, on showing mistake, &c., in that particular. *Held*, that the application was not to be regarded as embodied in the policy, further than necessary to correct the mistake, &c.

To avail himself of a defence that the application and survey were part of the policy and a warranty, the defendant must set up the defence in his answer. It is not enough that the application is proved on the trial.

THIS was an appeal by the defendant from a judgment in favor of the plaintiff upon trial at Special Term. The facts are stated in the opinion of MILLER, P. J.

*J. S. Landon*, for the appellant and defendant.

*L. Seymour*, for the respondent and plaintiff.

MILLER, P. J., POTTER and PARKER, JJ.

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By the Court—MILLER, P. J. This was an action upon a policy of insurance to recover the amount insured, \$1,500, and to reform the policy so as to strike out a clause vitiating the same in case the mill was run at night, and make it correspond with the answer to one of the interrogatories in the plaintiff's application, which stated that the mill was to run day and night except Sundays. The defences set up by the defendant were, 1st. Non-insurance. 2d. Arson by the plaintiff. 3d. Loss of the mill while running in the night-time. 4th. Failing to furnish the requisite proofs.

The cause was tried before the Hon. William Murray, one of the justices of this court, at a Special Term held in Broome county on the 18th of July, 1871, without a jury. It appeared upon the trial, among other things, that the policy issued upon the application contained a clause which the judge found was inadvertently and by mistake inserted contrary to the plaintiff's agreement with the agent (which was that the mill was to run night and day), to the effect that if the mill ran at night without special agreement indorsed upon the policy the same should be void. This clause was unknown to the plaintiff at the time of the insurance, and for a long time thereafter. It also appeared that to one of the interrogations, "what material is used for lighting the mill?" the answer was, "kerosene lamps hung securely and filled by daylight only." And the proof showed that when the fire was discovered there was a tin hand kerosene lamp burning, standing upon the cap of the engine in the mill, and that such lamps were used in the mill.

It further appeared that the plaintiff stated a less amount of insurance upon the mill than there actually was, in answer to an interrogatory on that subject. The cause was submitted upon briefs and points by the respective counsel, and the defendant's counsel moved to dismiss the complaint, in his points furnished, upon the ground, among others, that the representations made as to the lights and the amount of insurance were broken. The justice decided that the plaintiff was entitled to a judgment reforming the policy as

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demand, and that the points made as to the amount of insurance and the lights were not well taken, because no such objection to the policy or defence to the action is pointed out or alleged in the answer, and found in favor of the plaintiff for the amount of the policy, interest and costs.

I think that the judge was right in holding that the objections made by the defendant's counsel to a recovery were not well taken, and in finding that the plaintiff was entitled to recover.

The policy provides that if an application or survey is referred to therein, that it shall be considered a part of the contract, and a warranty by the assured. The application and survey are not referred to in this policy; and although the complaint alleges that the agreement for an insurance was founded upon the application, with a view of obtaining a reformation of the contract as to the time when the mill was to run, I am inclined to think that this allegation does not necessarily make the application a part of the policy as to other matters.

But even if the question is now presented, and the defendant is in a position to claim that the representations made in the application constituted a warranty, the breach of which would avoid the policy, I am at loss to see how the defendant can avail himself of this position, inasmuch as no such defences were interposed in the answer, and no such point was raised upon the trial so as to enable the plaintiff to meet it. If the defendant had intended to claim that there were any such defences in the case, he should have moved the court for permission to amend his answer so as to set them up, and give the plaintiff an opportunity to meet the questions which would then have arisen. Perhaps these defences had been waived by the defendant, or the plaintiff had some other perfect answer to them. This could only have been ascertained upon a motion to amend; and as the defendant failed to call the attention of the court to the subject by such a motion, or in any other manner upon the trial, he has no grounds for complaint at the decision of the judge.

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The plaintiff had a right to know if any such questions were to be litigated; and the case having been tried upon entirely a different theory, and without notice to the plaintiff that any such defences were claimed to exist, it would be an entire surprise upon him if they were now allowed to prevail. This should not be sanctioned, as it would give the defendant an advantage from his own omission and neglect.

This is not a case where the court is authorized to disregard the entire omission to interpose the defences alleged, as a mere error or defect in pleading, which does not affect the substantial rights of the adverse party. (Code, § 176.) Nor does it come within any provision of the Code authorizing amendments, or a disregard of a variance between the pleadings and the proof. Under the circumstances presented, the court is not authorized to consider the answer as amended so as to conform the pleadings to the proof.

The judgment must be affirmed, with costs.

PARKER, J. I concur, upon the ground that the survey and application does not form any part of the policy, and that the representations therein are not warranties. If, in fact, they were warranties, I should be inclined to hold that, having been proved on the trial, without objection, and thus forming part of the case furnished to us, we might disregard the defect in the pleadings, and give effect to the proof.

POTTER, J., dissented.

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Chapin v. Hollister.

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WALTER H. CHAPIN, Respondent, v. DEWITT C. HOLLISTER,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

In an action upon the warranty of a chattel, brought by an assignee, whose assignment in writing expressed a consideration "for value received," *held*, that evidence of the actual amount paid on the assignment was properly excluded.

And it was not error to disallow a cross-examination of the assignor, as to such amount, although he had given testimony as to the value of the chattel as warranted, there being no abuse of discretion in excluding it. *Held*, also, that an objection was properly sustained to the cross-examination of the assignor respecting his conversation with the warrantor directly after completion of the sale with warranty, the materiality of the testimony not appearing.

Nor was it proper to show a conversation between the assignor and assignee, prior to the sale, as to the actual value of the chattel, as tending either to show that there was no warranty, or that he did not rely upon one.

THIS was an appeal by the defendant from a judgment of the County Court of Otsego county, affirming the judgment upon a verdict in the Justice's Court.

The action was upon a breach of warranty, given on the sale of sundry cows, which were alleged to have been warranted as coming in in March and May. The plaintiff claimed as assignee of the vendee. The warranty was denied by the defendant.

Upon the trial, the plaintiff proved a written assignment to him, for value received, of all claim, causes of action, &c., against the defendant, of every nature; and proved by his assignor the sale of the cows, with warranty, as laid in the complaint; also, a breach of the warranty. He also proved, by the same witness, the value which the cattle would have had if they had conformed to the warranty. Upon cross-examination, the assignor was asked what he had received for the claim in suit and transfer, and the question was excluded under the plaintiff's objection as calling for secondary and immaterial evidence.

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Evidence was also given by the plaintiff corroborating the assignor's testimony respecting the nature of the bargain, sale and warranty; and one Talbott, who had testified to the occurrence and conversation at and immediately preceding the sale, was asked upon cross-examination whether there had been any conversation between the defendant and the assignor about the cows, after the latter had bought them and before he left the field. This was also excluded, under objection.

The defendant called a witness to prove a conversation between the assignor and himself (witness), which had occurred prior to the sale, to show that he had informed the assignor of the time when the cows would come in, viz., at times later than those warranted afterward upon the sale. This testimony was also excluded.

The jury rendered a verdict for the plaintiff. Judgment was entered and affirmed on appeal to the County Court, from the decision of which court this appeal was taken.

*Morgan & Rafter*, for the appellant.

*Aylesworth & Harrington*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. There was no error in overruling the question put to the witness as to what the plaintiff gave him for the claim, and the other questions as to the consideration paid by the plaintiff for the cause of action. The assignment was in writing and expressed value received, which was a sufficient consideration.

The evidence is claimed to have been proper as a cross-examination of the witness, who had testified to the value of the property. The amount paid, even if a trifling sum, would not tend to contradict the testimony of the witness in this particular, as a transfer of a claim of this kind is governed by circumstances, and depends upon the solvency of the defendant, the charges and expenses of litigation, the indisposition of the original claimant to enter into it, and various

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other considerations, some of which are purely personal, and could have no direct bearing upon the question of actual damages.

How far the court should open the door upon a cross-examination to an inquiry which would call out all these matters, is, to a considerable extent, a question of discretion; and as there is no reason to suppose that it was improperly exercised in this case, there was no error in the decision of the justice in this respect.

It may also be observed that the defendant was not questioned as to the amount of damages proved on the trial, and the jury did not follow the testimony of the witness, so that the plaintiff was in no event injured.

The evidence of the conversation between the defendant and plaintiff's assignee, after the sale of the cows in question, was not material. The bargain had been made and the money paid, and nothing remained to be done to complete the contract. The warranty was perfected, and the offer of evidence did not make it apparent that there was any conversation after the sale which had any bearing upon the case. It is the duty of the defendant to make it appear affirmatively that the evidence was material and its rejection erroneous. This is not done, and the objection, I think, was properly sustained.

The evidence of the conversation and of what took place between Talbott and Clayton before the sale, in the absence of the defendant, was properly excluded.

If the defendant warranted the cows after what was offered to be proved when the sale was made, it appears to me it is of but little consequence what information the assignee of the plaintiff had received in regard to them previous to the sale. If the defendant chose to warrant them in despite of this, the purchaser had a right to rely on the warranty, and the defendant was bound by his contract.

Nor was the testimony admissible as impairing the version given by Talbott of the transaction. How would it affect that? It by no means necessarily follows that the defendant



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did not warrant the cows, as testified to by Talbott, because Talbott may have seen the record kept by Hollister, or that Talbott had it in mind when he made the contract, or that if he did know of it, that he did not rely upon the defendant's warranty.

Such evidence would be remote to impair the testimony of the witness, and I think was not admissible.

Judgment affirmed, with costs.

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DANIEL THOMPSON et al., Commissioner of Highways, &c.,  
Respondents, v. SAMUEL ALLEN, Appellant.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

Commissioners of highways changed the course of a sluiceway crossing and draining a highway, and turned the water upon the defendant's land. The defendant obstructed the sluice and was sued for a penalty. *Held*, that if the effect of the change was to destroy his cultivated fields, the defendant might peaceably abate the sluice in that manner as a nuisance. The plaintiff's remedy was not confined to an action against the commissioners for improper, malicious, &c., acts, but he might prove such injuries in defence to the action.

THE plaintiffs brought an action against the defendant, in Justice's Court of Schuyler county, in March, 1871, to recover a penalty of five dollars, for filling up and obstructing a certain ditch (constructed for draining water from a highway), under section 102, art. 5, title 1, chap. 16, part 1, R. S.

On the trial it appeared that the obstruction was placed in the north end of a sluice, across the turnpike part of the highway. The sluice, as defendant offered to show on the trial, diverted the waters from their natural channel, and turned them upon the cultivated fields of the defendant on the south side of the highway, where they had caused the defendant great injury by cutting deep and broad gullies through his lands, and destroying his crops. The waters thus thrown upon the defendant's land had, pre-

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vions to the construction of the sluice in question, flowed across the highway at a point several rods west of the obstructed sluice, where they ran off south-westerly through lands owned by one Ephraim Allen.

The defendant offered evidence to establish that for some time before the construction of the sluice in question, the water on the north side of the highway, on lands of one Becker, who adjoined the defendant on the west, had been conducted by an artificial channel cut on the east side of Becker's land, down to the highway, and then caused to flow west, in a ditch on the north side of the highway to the point of its natural flow south-westerly, where it crossed the turnpike through a sluiceway, at its original and natural channel, running off from Becker's land at the same point, and in precisely the same channel as it would have done had no ditch been cut on Becker's farm.

The evidence was objected to by the plaintiffs, and excluded by the justice; to which ruling the defendant duly excepted.

Judgment was given against the defendant for five dollars penalty, and costs, from which he appealed to the County Court of Schuyler county, where the judgment was affirmed.

The defendant appealed from the judgment of the County Court to the Supreme Court.

The case was submitted upon printed points.

*William J. Norton* and *Marcus Lyon*, for the appellants.

*O. P. Hurd*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. I think that the justice, in excluding the testimony offered by the defendant to prove that the plaintiffs diverted the water from its natural course, and the effect the water had on the defendant's premises after being turned on by the plaintiffs, committed an error. If the effect of turning the water on the defendant's lands was to destroy his cultivated fields, then it created a private nuisance, which may

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be abated by the party aggrieved thereby, provided he commits no riot in doing so. (3 Black. Com., p. 5.) It is like the case of a house or wall erected so near to a party that it stops ancient lights, which is a private nuisance, and justifies the aggrieved party in entering upon his neighbor's land and peaceably pulling it away; or of a gate erected across the public highway, which is a *common nuisance*, and any one may cut down and destroy.

These cases are stated by Mr. Justice BLACKSTONE as illustrations, and the reason given for the exercise of this summary method is, because injuries of this character require an immediate remedy, and cannot wait the slow progress of the ordinary forms of justice. (Id., p. 6.) There must be some limit to the powers of commissioners of highways, and the right to injure a party by turning water upon his land, if not restricted within proper bounds, might be carried to an extent which would be utterly destructive to the property thus invaded. Suppose a large stream was thus turned, which might sweep away everything within its course, can there be any doubt that the owner of the land would be justified in diverting the water so as to save his rights? These officers have no power, judicially or otherwise, thus to infringe upon private rights. While they should be fully protected in a proper discharge of their duties, yet when they go so far as to create a nuisance on the land of another they stand in the same position as private individuals, and the injured party has a right to abate such nuisance. The testimony offered tended to show that such was the case, and, if it established a nuisance, would have been a complete defence to the action brought for the penalty.

It is no answer to say that the aggrieved party must be left to a private remedy by action, when they act improperly or maliciously, for such a course might in many cases prove utterly inadequate to redress the wrong, as by the great delay the property affected might be utterly destroyed.

Of course it should be an extreme case which would justify a party in assuming to act as his own vindicator, and while in

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most cases such party should be left to the ordinary course of law, yet the offer of testimony here would make an exception to this general salutary rule.

For the error of the justice the judgment rendered by him and that of the County Court must be reversed, with costs.

Judgment reversed.

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WILLIAM BELLOWS, Respondent, v. PARMENAS ELMENDORF,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

Where one offers for sale, or has in his possession, the green skin or fresh carcass of a deer, killed in violation of chap. 898, L. 1867, he is liable for the penalty, although his title and possession were acquired by purchase at sheriff's sale on execution against the property of the killer.

THIS was an appeal from a judgment for the plaintiff, entered upon the decision of the court without a jury.

The action was brought to recover a penalty for violation of the act for the preservation of moose, wild deer, etc. (L. 1867, p. 2240, vol. 2), by which it is provided, among other things, as follows:

"Section 1. No person shall kill, or pursue with intent to kill, any moose or wild deer, save only during the months of October, November and December, or *shall expose for sale, or have in his or her possession, any green moose or deer skin or fresh venison*, save only in the months aforesaid; and for ten days in the month of January, unless received for sale prior to the 11th of January."

A jury trial was waived, and the court, having heard the evidence upon the issues joined, found and reported the following facts and conclusions of law, viz.:

"A wild deer was killed by Andrew J. Knapp on the 8th day of January, 1868, in the county of Ulster, and the skin and carcass brought by said Knapp into the town of Middletown, county of Delaware, on the 14th of January, 1868.

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A't this time the defendant had a judgment of \$24.41 against said Knapp, and on said 14th day of January caused an execution to be issued upon said judgment, by virtue of which a constable duly levied upon and sold said skin and carcass at public sale, on the 21st day of January, 1868, to the defendant. The defendant on the same day sold said skin and carcass to one W. W. Clarke, at said town of Middletown, and during the day aforesaid, to wit, January 21, 1868, the said defendant had in his possession, at Middletown aforesaid, a green deer skin and fresh venison, products of a wild deer, so purchased by said defendant after the 11th day of January, 1868. As conclusions of law upon the foregoing facts, I do hold and decide that by reason of the facts aforesaid, the defendant became and was indebted to the plaintiff in the sum of fifty dollars, as and for a penalty occurring under and by virtue of chapter 898 of the Laws of New York, passed May 13, 1867. Judgment is therefore ordered for said sum of fifty dollars, together with the costs and disbursements of this action, in favor of plaintiff and against defendant. Dated December 1st, 1870."

Judgment was entered on the decision for the plaintiff, and the defendant appealed.

*A. R. Henderson*, for the appellant.

*Wm. Gleason*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. The defendant purchased the carcass and skin of a deer, which had been killed in violation of the statute, at a constable's sale, under a judgment in his favor against the party who had killed the same, and after the purchase, on the same day, sold the carcass and skin to another person.

The statute under which this action is brought provides that "no person shall kill, or pursue with intent to kill, any

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moose or wild deer, save only during" certain months which are named, "or shall expose for sale or have in his or her possession any green moose or deer skin or fresh venison," &c., within certain periods which are also named, "unless it shall have been received for sale prior to the eleventh day of January." (Laws of 1867, p. 2240, § 1.) A penalty is provided of fifty dollars for a violation of this and other provisions. (See § 5 of same act, p. 2241.)

The defendant was within the provisions of the law cited, in having the deer skin and venison in his possession and in exposing the same for sale. The fact that the defendant obtained the property by virtue of a sale under an execution does not, I think, exonerate him from liability for the penalty. Although the defendant was authorized to levy and sell the property of the judgment debtor, yet, in assuming to sell and take title to property which subjected him to a penalty, he took the risk of being subjected to the consequences of subsequently having the same in his possession and of exposing the same for sale. While the judgment debtor held possession of the property it was subject to the penalty, and any one who acquired it of him took it liable to the same consequences. There is no inconsistency between the statute authorizing a sale of goods and the one imposing the penalty, and the enforcement of the latter in this case does not necessarily require a repeal of the power by implication or otherwise. The sale could only pass such title as the debtor had, and the purchaser acquired only this, and no more. When he purchased and sold, he stood in the place of the original holder. Conceding that there was a right to buy and sell the property, it would confer no right to purchase, keep in possession or expose for sale in violation of the statute.

In support of the construction that the statute was intended to embrace all cases where the animal killed was found in the possession of a person, section 21 of the act provides, that any person proving that the animals found in his or her possession prior to the periods prohibited, or that they were killed outside of the State, and that the law of such place did

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not prohibit such killing, shall be exempted from the penalties of the act. And section twenty-two makes common carriers and express companies liable, unless they show themselves to be within the same prohibition.

These provisions, as well as the plain import of the act, tend to show that the legislature intended to prevent any evasion, and to make all persons liable who had possession of or exposed such property for sale.

The judge was clearly right on the trial, and the judgment must be affirmed with costs.

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PHINEAS C. DUMOND Appellant, *v.* ANN KIFF and others,  
Respondents.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

A will and codicil were executed by a person eighty years of age ; neither of the subscribing witnesses, who were the same to each instrument, testified to his mental capacity ; one of them thought him not of sound mind at the execution of either paper, the first being executed in April, and second in June following. It also appeared that in the succeeding autumn the testator failed to know his children, and inquired how many he had, and could only name some of them. *Held*, that the surrogate's decision, refusing probate of the instruments, should be affirmed.

THIS was an appeal from the decision of the surrogate of Delaware county, refusing probate to certain instruments propounded before him as the last will and testament and codicil thereto of James Dumond, deceased, and bearing date April 8, 1863, and June 23, 1863, respectively.

The testator died at the age of eighty-seven years, having executed the instruments mentioned in his eighty first year.

The probate was resisted upon the ground of mental incapacity and undue influence, fraud, &c.

The subscribing witnesses to each of the instruments were the same. One of them could "not tell anything about the testator's mind" at the time of their execution, and testified that he had no recollection of signing his name as a witness,

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though he identified his signature as his own, and upon cross-examination said that he could not recollect whether the testator was then of sound mind or not.

The other subscribing witness, whose memory retained the particulars of both executions, and who detailed them at length, testified as follows, viz.: "I could not say that he (testator) was of sound mind and memory at the time I witnessed the will; I don't think he was sound, and I say the same as to the second writing."

Other evidence was given by the contestants, which is mentioned in the opinion, and there was evidence also on the part of the proponents, tending to show that the testator had testamentary capacity at the date of the instruments offered.

*J. R. Allaben*, for the appellant.

*William Gleason*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. We think that the weight of the evidence in this case is strongly against the capacity of the testator to make a valid testamentary disposition of his estate. Neither of the subscribing witnesses to the will and codicil testify to the mental capacity of the testator at the time when these instruments were executed; and one of them expresses an opinion that the testator was not of sound mind on either occasion.

The proof also shows that the autumn after the will was executed the deceased did not know that one of his sons, who lived near him, was one of his children; and he denied that he knew him. It also appears that, in 1863, one of his sons, who had lived a few miles off, came to see him, and conversed with him some time. He inquired who it was, and on being asked if he did not know him, he replied that he said he was his boy, but he had no recollection of a son of that name. He frequently asked how many children he had, and could only name some of them.



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In 1862 his daughter, who lived in Pennsylvania, who had previously visited him in 1859, came to see him, and it was a long time before he could be made to understand that she was his daughter, or that he had any such child.

There is other evidence, showing senile dementia and that the deceased was incompetent to make a will, which it is unnecessary to state, as from that already referred to it is apparent that the deceased had not sufficient mind to comprehend the nature and effect of the acts he was performing, the relation he held to the various persons who had claims on his bounty, and that he was incapable of making a rational selection among them. (25 N. Y., 205.)

Surely, under the circumstances presented, no other rational conclusion could be arrived at than that the deceased was without sufficient capacity to make a valid disposition of his property; and the surrogate was right in rejecting the instruments propounded for probate.

There was no such error in the rulings of the surrogate as to the admission and rejection of evidence as authorizes a reversal of his decision.

Proceedings affirmed, with costs of the several parties to be paid out of the estate.

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THE PEOPLE ex rel. WILLIAM YOUMANS, Jr., Supervisor of the Town of Delhi, v. EDWIN D. WAGNER, County Judge of Delaware county.

(GENERAL TERM, THIRD DEPARTMENT, MAY, 1873.)

A petitioner for bonding a town for railroad purposes may bring a *certiorari* to review proceedings of the county judge, on the petition, which have been illegally conducted.

A *certiorari* brought in the name of A. B., "supervisor of the town of, etc.," may be regarded, if the supervisor has no authority, as the individual proceeding of A. B.

And so it may be regarded as the proceeding of the town, if the individual is not entitled to institute it.

The town may bring the proceeding to review the action of the county judge.

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Petitioners may withdraw their signatures at any time before the final submission of the matter to the judge.

On proceedings upon the petition, the contestants offered to have certain petitioners appear and withdraw their consents. *Held*, that it was error to reject this offer upon a general objection, and that the objection that the petitioners were not actually produced could not be first made upon review.

It is not essential that the parties opposing the proceedings before the county judge should be named in his return to a writ of *certiorari*.

CERTIORARI to review the proceedings on application to bond the town of Delhi, Delaware county, before the judge of that county.

*O. W. Smith*, for the relator.

*S. H. White*, for the respondent.

Present—MILLER, P. J., POTTER and PARKER, JJ.

MILLER, P. J. This *certiorari* is argued in connection with a motion to set aside the proceedings for irregularity, upon the ground that the relator is incompetent to act as such, because he was one of the original petitioners for the bonding of the town, and, not having withdrawn, he is estopped from bringing a *certiorari*; and also for the reason that there is no party in the proceeding legally aggrieved by the adjudication or entitled to sue out the writ.

Even if there may be a question whether the relator, as supervisor, can institute this proceeding, I am inclined to think that he is not precluded as an individual from being the relator. There is no statutory prohibition against it, and it may well be that a person who has signed a petition for bonding a town according to law is not deprived of the right to review the proceedings where they have been illegally conducted. It is signed upon the hypothesis that a majority of the tax-payers are to consent to the bonding, and that the proceedings shall be lawful in all respects. Now, in case a portion of the tax-payers withdraw, or offer to withdraw, so as to render the amount insufficient within the meaning of

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the law, or in case the county judge exceeds his powers, there is no good reason why a person who has signed should be bound so as to be unable to question the illegal act.

The proceeding is not an action in which the tax-payers signing are parties, and hence it cannot be said that a relator who is a petitioner in such a case occupies an antagonistic or inconsistent position. Besides, he acts not for himself alone, but for others who are tax-payers, and on the behalf of the people, who are in fact the plaintiffs, institutes the proceeding. The object of a relator in such a proceeding is, in part at least, to have a party who may be responsible for the costs in case of an adverse result, and I see no good reason why a person who has petitioned for the issuing of the bonds is not a suitable person for the purposes named, as well as to represent the people interested, or why such person is estopped in law from being a relator.

If we regard as surplusage, as I think we have a right to do, the description of the relator's official character in the title of the case, the *certiorari* is properly brought in his name as an individual.

Even if there be any serious doubt as to the right of the relator to bring a *certiorari*, as supervisor of the town, or individually, I am inclined to think that the proceeding can be upheld by amending the title of the case, in striking out the name of Youmans and his title, thus making it a case in the name of the town of Delhi alone. Such an amendment comes within section 173 of the Code, and should be allowed in furtherance of justice.

The right of the town to bring the *certiorari*, I think, is entirely manifest. The statute (S. L. of 1871, 2118, § 10) does not limit the right to review the proceedings by *certiorari* in such cases to any particular class of persons, and I think the town, which is to be bonded, is clearly entitled to be a party in a proceeding which may seriously affect its local interests and property, as well as the rights of at least every taxable inhabitant. The town is liable to pay the bonds, by means of the property of its tax-payers, and is bound to pro-

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vide for the interest and principal, and it would therefore seem to follow that it would have a right to maintain an action in regard to their validity.

In *The Town of Duaneburgh v. Jenkins* (46 Barb., 294), it was held that a town may maintain an action to restrain the negotiation of bonds issued in the name of a town, by a person assuming to act as a commissioner, in payment for subscriptions to stock of a railroad company. This case is in point and applicable directly to the one at bar.

As there is no valid ground for quashing the writ, it becomes important to consider whether the proceedings of the county judge were legal and in accordance with the statutes (S. L. of 1869, 2303; S. L. of 1871, 2115).

It appears from the return that the contestants appeared before the county judge, and although their names are not given, it is manifest that there was a conflict upon the question presented to him, as objections were made and overruled and witnesses called for the contestants and sworn in opposition to the proposed bonding.

It is not essential that the parties opposing should be named specifically, and does not deprive them of the advantages and rights acquired by their appearance, because they are not mentioned in the return of the county judge to the writ.

The county judge was clearly wrong in not allowing certain tax-payers to withdraw their names from the petition, as was proposed. The contestants offered to have forty-six of the persons, whose names were signed to the petition, representing property upon the assessment roll to the amount of \$47,470, appear and withdraw their consent. This was objected to by the applicants and the offer refused, and I think was error. Had these names been stricken out, it would have reduced the names and amount of taxable property, so that there would not have been the requisite number of names or amount of property to authorize the bonding of the town.

In *The People v. Sawyer*, recently decided in the Court of Appeals, it was held that the petitioners have the right to

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withdraw their names from the petition at any time before the case is finally submitted to the county judge.

The offer made by the contestants covered this distinct proposition, was not objected to as being sufficiently specific, and it is no answer to its admissibility to say that no contestant appeared and offered to withdraw. The ruling of the county judge precluded any necessity of a personal appearance of each one or any of the tax-payers referred to, and so long as the offer appears to have been made in good faith it was sufficient. In fact, it is to be assumed, in the absence of any intimation in the proceedings to the contrary, that they were ready to present themselves if they had not been prevented from doing so, even if they were not personally present.

Several other objections are urged to the proceeding, but as the error of the county judge already stated is a fatal one, it is not necessary to discuss them.

The motion to set aside the proceedings must be denied, and the proceedings reversed and dismissed, without cost.

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NATHANIEL GALLUP, Respondent, v. THE ALBANY RAILWAY,  
Appellant.

(GENERAL TERM, THIRD DEPARTMENT, SEPTEMBER, 1872.)

Consequential damage to the demised premises resulting from the lessor's acts not done upon them, and not depriving the tenant of possession of any part of them, is no defence to an action for the rent.

The defendant, a horse railway company, leased the plaintiff's premises located in a city and on a public street; on which street, by permission of the municipality and subject to the latter's right to repair, alter, &c., it had placed tracks communicating with the premises. Afterward, under a city ordinance, the grade of the street was changed and the communication removed and rendered impracticable, materially impairing the value of the plaintiff's occupancy. *Held*, that the plaintiff's damages were not a defence to an action for rent.

*Held*, also, that they did not arise out of the same contract or transaction, as the claim for rent.

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Whether covenants in leases may be implied as at common law under the Revised Statutes, *quere*.

But the covenant for quiet enjoyment is not to be implied as extending to the enjoyment of anything beyond the demised premises.

Nor to override other necessary implications in the lease.

*Mack v. Putschen* (42 N. Y., 171) explained in this particular.

Where the lessor did the grading under an option given, by the ordinance, to the owners of adjoining property, — *Held*, that in so doing he acted as the agent of the city, and his act was the act of the latter.

And that the act of the plaintiff not being willful or trespass, the defendant's damages could not be counterclaimed or recouped in an action for rent.

Where taxes are assessed upon the demised premises, which, by covenant in the lease, the tenant is to pay, but refuses to do so on demand after warrant issued for their collection, the lessor may pay the same and recover the amount from him.

THIS was an appeal from a judgment for the plaintiff, entered on the report of a referee.

The plaintiff sued, on the 17th September, 1869, to recover certain taxes paid by him, alleging the defendant's liability, under a certain demise, as follows, viz. :

" This is to certify that the Albany railway have hired and taken from N. Gallup the premises now occupied by them, in the ninth ward of the city of Albany, on the corner of Swan and Fayette streets, for the term of two years, to commence the first day of May next, at the yearly rent of \$1,000, payable quarterly, and the ordinary taxes and water rates and repairs necessary, with all alterations, if any needed. And they do hereby promise to make punctual payment of the rent, in the manner aforesaid, and quit and surrender the premises at the expiration of the said term in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And they also promise not to let the aforesaid premises, or any part thereof, to any person or persons whatever, without obtaining the written permission of the said lessor. And in case of not complying with any of the covenants contained herein, the lessor, in his option, shall have the power and the right of terminating and ending this lease immediately, and agree to forfeit to the said lessor the sum of \$100, as and for liquidated damages.

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"In case said premises shall be destroyed by fire before or during said term, then this lease to cease and determine; the rent to be paid up to that time.

"Given under my hand and seal the 9th day of April, 1868. Signed," &c.

The defendant, among other matters, alleged in defence and as a counterclaim that the plaintiff had not permitted it to have the sole and uninterrupted use of the demised premises, and set forth certain acts of the plaintiff in the digging down of streets on which the premises were situated, and other acts in connection with the same.

Upon the trial the plaintiff proved the lease and the assessment upon the demised property in 1868 against him, as the owner thereof, of taxes for that year; also the issuing of a warrant for collection thereof and his payment of the same; and that before making the payment, and after presentation to him of the warrant issued, he had called upon the defendant's president, notified him of the warrant, and demanded that the taxes should be paid, which demand was refused.

It also appeared, and the referee found, that the defendant's railway was laid upon Swan street and communicated with the demised premises, upon which the defendants had extensive accommodations for storage of its cars and stabling. The tracks had been so laid by the defendant, prior to the date of the lease, and while the defendant occupied the premises under prior rights of occupancy. The branch from the main track across the sidewalk, communicating with the stables, &c., had also been made at that time, and a bridge had been built over the gutter next to the sidewalk.

The plaintiff proved, under defendant's objection, an ordinance of the city of Albany, of June 15, 1868, for the excavation and filling of Elk street, on which the demised premises were situated, and also a similar ordinance for the excavation, filling, &c., of Swan street, upon which they were also situated, of September 7th, 1868.

It was also shown and found that proceedings were taken,  
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under the ordinances for grading the streets, in accordance with them, and that advertisement was made by the street superintendent of the city for proposals for the work; that the plaintiff notified the city that he would do the work in front of the demised premises, as he claimed the right to do under other existing ordinances of the city, and thereafter began the work in that respect, and prosecuted it with proper diligence to completion, and that the work was accepted by the authorized superintendent of the city.

That in performing the work it became necessary to lower the grade of Swan street and destroy the communication from the tracks on that street with the premises, and that the defendant was obliged to incur expense in making new buildings and changes in the old buildings, and to abandon entirely the communication from Swan street, and to suffer other damages and inconvenience in its occupancy of the premises.

The referee also found as follows, viz.:

"1. That the work of excavating and grading Swan street in front of the premises in question was commenced in September, 1868, and was not completed until about the middle of June, 1869.

"2. That the said work might have been done in from ten to thirty days.

"3. That if the plaintiff had not elected to do the work himself, and the same had been done under the direction of the street superintendent, it would not have been commenced until the spring of 1869, and the defendant would have continued to have the use of the whole of the premises in question until that time.

"4. That by reason of plaintiff's electing and undertaking to do the work himself, the defendant was deprived of the use of its car-house from September, 1868, till the spring of 1869.

"5. That the following is the only law or ordinance under which the plaintiff had the right or privilege to give notice to the superintendent that he would himself do the work



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required by the ordinance of September 7th, 1868, to be done in front of said denuded premises, or to do said work, viz.:

“§ 5. Whenever the level or pitch of a street to be improved shall have been established by the common council, and the work shall be otherwise ready to be contracted, notice thereof in writing, signed by a majority of the flagging and paving committee, and specifying the street to be improved, shall be given to the superintendent of that section in which the contemplated improvement is to be made; and the said superintendent shall thereupon give public notice that proposals will be received for making such improvement, and that those owners of lots who may wish to make the improvement themselves in front of their own property, so far as they are interested, must signify their intention so to do to said superintendent in writing before the expiration of said notice. The proposals shall be required to state the price per cubic yard for excavating, filling, pitching, leveling or forming a street, and whenever a street is to be paved, or paved and flagged, they shall be required to state the price per running foot for each lot. And in all cases the said proposals shall include the furnishing of sand, paving-stone, curb-stone, brick, and all other materials, paving, and all other labor necessary to make the said improvement, as contemplated by the law ordering the same.’”

The findings of the referee, which were in favor of the plaintiff, will appear from the following exceptions taken by the defendant, viz.:

“1. Defendant excepts to the finding of the referee, that the plaintiff and defendant, as parties to the lease mentioned in said report, contracted with reference to the possibility of an alteration in the grade of Swan street by the authorities of the city of Albany, and that defendant in taking said lease impliedly assumed the risk from the happening of such contingency.

“2. And defendant also excepts to the conclusion of said referee, that plaintiff was at liberty to perform the work of excavating and grading Swan street, at the time and in the manner in which the same was performed by him.

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"3. Defendant also excepts to the conclusion of said referee, that in performing the said work the defendant acted as the agent duly authorized of the city of Albany, to carry out said ordinance.

"4. Defendant also excepts to the conclusion of said referee, that the defendant was bound to pay the taxes when they were paid by plaintiff, and bound to pay the same to the proper authorities, and that upon payment by the plaintiff an immediate cause of action accrued to him for the amount so paid.

"5. Defendant also excepts to the conclusion that the defendant cannot recoup or set off any damages by reason of the premises, or defend against this suit by reason of any disturbance of his possession by the acts set forth in the said report.

"6. Defendant also excepts to the conclusion that the action is well brought, and that the plaintiff is entitled to recover the sum of \$286.99, and interest and costs.

"7. Defendant also excepts to said report, for that it does not find that defendant was wrongfully evicted from a portion of the demised premises by plaintiff, and that therefore plaintiff cannot recover in this action.

"8. Defendant also excepts to said report, for that it does not find that defendant has a good cause of action against the plaintiff for the sum of \$636.69, by reason of the acts of eviction and disturbance mentioned in said report, and is entitled to judgment for the same by way of counter-claim against the plaintiff.

"9. Defendant also excepts to said report, for that it does not find that this action was prematurely brought by plaintiff, and that no liability for taxes on the demised premises could be enforced until the expiration of the term of said lease."

*Matthew Hale*, for the appellant.

*G. L. Stedman*, for the respondent.

Present—P. POTTER, P. J. ; PARKER and DANIELS, JJ.

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P. POTTER, P. J. The defendant continued to occupy the whole of the demised premises during the term of the lease. Unless the defendant was evicted of the demised premises or some part thereof, he is liable to the payment of rent so long as he remains in possession under his lease. The defendant has a remedy to recover damages for the breach of any express or implied covenant by an action for such breach (*Eltheridge v. Osborn*, 12 Wend., 529, 531, 532); though, perhaps, under the Code, where the demands of both parties spring out of the same contract or transaction, the defendant may recoup, even though the damages are unliquidated. But the damages in this case, claimed to be recouped, do not arise out of the same contract, but from a tortious act, as claimed, of the plaintiffs, in depriving them of access to a portion of the premises, and from the proper enjoyment thereof. These acts complained of are entirely independent of any covenant in the lease and are only consequential, and resulting from acts *not* committed upon the demised premises, the whole of which the defendant continued to occupy for the whole term. These acts are no defence to an action for rent. (*Edgerton v. Page*, 20 N. Y., 284.)

Neither the railroad in question, nor the streets upon which it was constructed, were any part of the demised premises. The right to use the railroad was enjoyed by the defendant before the date of the lease, and was entirely disconnected with the covenants in the plaintiff's lease, if any there were. The plaintiff assumed therein no right, control or authority over these streets; he received no consideration on account of them or their use, but, on the contrary, the right to use the said streets by the defendant had been granted to them before that time by the common council of the city of Albany, to whom they had made application for that purpose, and it was granted to them subject to the compliance by the defendant with certain conditions therein specified not only, but in contemplation of law they consented to accept of and enjoy them, subject to the powers of the said common council, under the twenty-ninth section of their charter (Laws of

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1842, chap. 275), "to regulate, keep in repair and *alter* the streets" of said city.

I think, therefore, that the learned referee was right in holding that the parties to the said lease contracted therein with reference to the possibility of an alteration in the grade of Swan street by the authorities of said city, and that the defendant, in taking said lease, impliedly assumed the risk of the happening of such contingency; and I think the referee might have added, that this risk was assumed by the defendant at the time of locating their road in said street, and prior to the date of the said contract of lease made with the plaintiff, and was no part of their contract with him. This case is clearly distinguished from *Blair v. Clayton* (18 N. Y., 529). In that case there were clear express covenants, on the part of the lessor, that the lessee should forever have and possess the right to use the amount of water specified, for the machinery described, with a positive covenant from the grantors for quiet enjoyment, without any hindrance, disturbance or molestation, &c., of appurtenances, a part of the thing demised.

In the case at bar, there were no words of grant, title or possession, or any covenant whatever on the part of the plaintiff as lessor, as will be seen by reference to the lease. And if, since the Revised Statutes (vol. 1, p. 738, §§ 160 [140]), covenants *can be implied*, as at common law, in a lease, as is claimed (and as seems to be stated by EARL, J., in *Mack v. Patchen*, 42 N. Y. R., 171), it will not be implied to extend to the enjoyment of anything beyond the limits of the demised premises; nor, as an implication of law, to override a prior implication of law to the contrary; nor, also, to the implication of a knowledge of the fact, on the part of the defendant, that he located the track of the said railroad, subject to such alterations as the common council of Albany, in their discretion, should make in the grade of their streets. And especially must this be so, where the claimed eviction is occasioned through no fault of the lessor. As the case of *Mack v. Patchen* is relied on by the defendant with confi

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dence, as controlling in this case, it is worthy of remark that, though it is said in that case that there was no *express* covenant of quiet enjoyment, it does not appear that there may not have been other covenants therein, which were equivalent to it and included it. The lease itself, in that case, does not appear, nor does it appear what other covenants were contained in it. The word *concessi* or *demisi*, in a lease, are words that imply a covenant for quiet enjoyment. (Spencer's Case, 5 Coke; 16 Shep. Touch., 160.) So from the word *grant*, in a lease or an assignment, a like covenant may be implied. (*Baker v. Harris*, 9 Ad. & Ellis, 535.) So a covenant to warrant and defend the title. (4 Kent Com., 472.) But in the absence of all covenants, since the Revised Statutes above cited, I do not think the case of *Mack v. Patchen* intends to hold that *in all leases*, without regard to form and language, there is an *implied* covenant for quiet enjoyment. It was not so even before the statute. This is not held in *Mack v. Patchen*.

In grading the street in front of the demised premises, the act was the act of the common council by their agent. The common council had the power to direct the act to be done. They did direct it. It was their act, equally the same, whether the plaintiff or another acted as the agent or servant in executing the direction. The law adds no individual responsibility upon the agent, provided he performs the act within the sphere of the duty of an agent or servant of the corporation. The law allowed the plaintiff to be such agent.

If the act of the plaintiff was a trespass, it was not directly committed upon the demised premises; even an individual personal act of the lessor, amounting to a mere trespass, not interfering with the substantial enjoyment of the demised premises by the lessee, is not equivalent to an eviction. (31 N. Y., 514.) There was neither actual nor constructive expulsion of the defendant from any portion of the premises.

But it is claimed that the plaintiff was liable to the defendant for the injury sustained by the latter, resulting from the

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act of the former as found by the referee in the following fact, in addition to those in the original report, viz. :

1st. That the work of excavating and grading Swan street in front of the premises in question was commenced in September, 1868, and was not completed until about the middle of June, 1869.

2d. That the said work might have been done in from ten to thirty days.

3d. That if the plaintiff had not elected to do the work himself, and the same had been done under the direction of the street superintendent, it would not have been commenced until the spring of 1869, and the defendant would have continued to have the use of the whole of the premises in question until that time.

4th. That by reason of plaintiff's electing and undertaking to do the work himself the defendant was deprived of the use of its car-house from September, 1868, until the spring of 1869.

1. This as a defence was not set up in the answer, and is not therefore a counter-claim.

2. The act of the plaintiff was not proved or found to be illegal.

3. That the act of the plaintiff being the act of the corporation, and not being either a trespass or such a willful act as to make the plaintiff as a servant or agent individually responsible, the injury, if any, could not be either a counter-claim or recouped in action.

4. The time occupied in performing the act complained of was a question directly between the plaintiff and the corporation of the city, and the injury to the defendant, being consequential, cannot be an offset, counter-claim, or subject of recoupment or defence to an action for rent.

The payment of the taxes and water rates of the demised premises were a part of the rent due to the plaintiff by the terms of the lease, and which the defendant covenanted to pay; which it omitted to pay; which it was notified and requested to pay; which the plaintiff personally and the

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plaintiff's property so demised was legally liable to pay; and after a warrant pursuant to law had been issued for the collection thereof, and the defendant requested to make payment, refused to pay. Thereupon the plaintiff paid the same, he being personally liable for the payment thereof. (Act of 1850, chap. 86, § 37.) These taxes so paid is the cause of action and the basis of recovery, the amount of which is not controverted.

I think it is clear that a party who is personally liable to pay such taxes, or whose property is liable to pay them, whose tenant is liable by covenant to pay them, and who omits or refuses to pay, upon proper demand may pay, and bring his action against the defaulting tenant and recover the same. (*Lageman v. Kloppenburg*, 2 E. D. Smith R., 126.) If I am right in the views above expressed, the judgment should be affirmed, with costs.

Judgment affirmed.

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PHILENA B. FISHER, Administratrix, &c., et al., Respondents,  
v. GEORGE HUBBELL, Executor, et al., Appellants.

(GENERAL TERM, FOURTH DEPARTMENT, JUNE, 1873.)

Under particular circumstances a creditor of an estate of a deceased person may maintain an action to collect his debt from a debtor to the estate. As in case of collusion between debtor and personal representative, the latter's insolvency, partnership in an indebted firm, or refusal to sue. So where the executor, whose estate is indebted, is administrator with the will annexed of the creditor estate, it is an exception to the general rule that the creditor must recover through the personal representative. Legatees claiming an equitable conversion of real estate under the will of another decedent in favor of their testator, or a charge of their legacies, by their testator, upon land devised to him by such will, the personal representative of each estate being the same, may bring an action for construction of the wills, an accounting, and payment of their legacies, and may join in one suit as creditors having claims of equal degree and under like circumstances.

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The action seeking to charge the equitable personal estate, the personal representative of the estate to be charged must be a party to it, and in his representative character, it is not sufficient to make him a party, as the representative of the estate through which the legatees claim.

APPEAL from an interlocutory order made at the Erie County Special Term, determining the rights of the parties in an equity case.

*H. R. Selden*, for the appellant.

*W. W. Rowley & DeL. Crittenden*, for the respondent.

Present—MULLIN, P. J., TALCOTT and E. D. SMITH, JJ.

By the Court—TALCOTT, J. Albert Banta, a resident of the county of Ontario, died there prior to February 10, 1864, leaving him surviving, Sarah Banta, his widow, and his two sons and heirs-at-law, Charles Edward Banta and Stanley A. Banta. He also left a last will, whereby he appointed the said Sarah Banta, his widow, sole executrix. Charles Edward Banta, one of the sons of said Albert, died in September, 1864, leaving a last will whereby the defendant, George Hubbell, was appointed his sole executor. Mrs. Sarah Banta proceeded with the execution of the will of Albert Banta until October, 1870, when she died, and thereupon the defendant, George Hubbell, was duly appointed administrator *de bonis non* of Albert Banta, with the will annexed.

The plaintiffs are legatees of Charles Edward Banta, the son of Albert Banta, and they have commenced this suit upon the ground that as such legatees they are creditors of the estate of Charles Edward Banta, and they claim:

First. That the estate of Albert Banta is indebted to the estate of Charles Edward Banta, inasmuch, as they say, that by the true construction of the will of Albert Banta, his real estate was, in equity, converted into personalty as of the time of the testator's death, and, therefore, that the share or proportion of that estate to which, under the will of Albert Banta, his deceased son, Charles Edward Banta, was entitled,



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was personal property due and which ought to be paid over to the said Hubbell, as the executor of said Charles Edward, to an extent sufficient to satisfy the balance due to said legatees.

Second. The plaintiffs claim that, if by the true construction of the will of Albert Banta, the real estate was not converted into personalty, but that Charles Edward took his proportion of the same as realty, under the provisions of the will, then that the legacies to which the plaintiffs are entitled under the will of Charles Edward, were, by the true construction of the latter will, charged upon the real estate of the said Charles Edward, are to be paid out of the same, as against Stanley A. Banta, the living son of Albert Banta, and the residuary devisee and legatee under the will of Charles Edward Banta. The case, it will be seen, thus involves the construction of the two wills in question. The justice who tried the cause determined both the propositions above stated in favor of the plaintiffs.

We think the plaintiffs have a right, under the circumstances, to maintain an action for the general purposes and objects which the plaintiffs seek in this suit. Under particular circumstances, a creditor of an estate of a deceased person may maintain an action to collect his debt from a debtor to the estate. "A person is not properly a party to a suit between whom and the plaintiff there is no proper privity or common interest, but his liability, if any, is to another person. This may be illustrated by the common case of a bill brought by a creditor against an executor or administrator for payment of his debt out of the assets. To such a bill a debtor to the estate is not ordinarily a proper party, because his liability is solely to the executor or administrator. But if a special case is made out, such as collusion between him and the executor or administrator, or insolvency of such personal representative, then, and in that case, the debtor may be made a party, as a means of uprooting the fraud or of securing the property." (Story's Eq. Pl., § 227; *Newlan v. Chapman*, 1 Vesey Sr., 105; *Doran v. Simpson*, 4 Vesey, 651; *Alsayer v Rowley*, 6 Vesey, 748.)

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Where the executor is a partner in a firm which is indebted to the estate, in such a case the debtor may be made a party to the suit of the creditor for an account of the assets and for payment of his debt. (*Gedge v. Trail*, 1 Russ. & M., 281.) So where the personal representative of the testator refuses to sue, any person beneficially interested in the estate, as legatee, has a right to institute a suit respecting such assets. (*Wilson v. Moore*, 1 Mylne & Keene, 127 and 142.) Here the executor of Charles Edward Banta, whose duty it is to see to the collection of the assets of the estate of which he is executor and to pay over the legacies, is also the administrator *de bonis non* of the estate which is claimed to be the debtor of Charles Edward Banta's estate. He cannot, as executor of Charles Edward, sue himself as administrator of Albert. (*Trustees, &c., &c. v. Stewart*, 27 Barb., 553.) So that without the necessity of imputing any fraudulent collusion or neglect, he stands in a position which is equivalent, in its effect, to a fraudulent collusion, or a refusal to sue, and we think it is a case which falls within the reason of the exceptions recognized in the cases cited.

If the plaintiffs can maintain the action at all, it seems to be clear that they may call for the construction of the will of Albert Banta, since such a construction is necessary to the determination of the question whether the estate of Albert Banta is indebted to the estate of Charles Edward.

It seems to be clear, that if the plaintiffs may maintain the action at all, they may join in the same, as creditors having claims of equal degree and under like circumstances. (Barbour on Parties, 385; Story's Eq. Jur., §§ 532, 538; *Lentillon v. Moffat*, 1 Ed. Ch. R., 451.)

But that the personal representative of the estate of Albert Banta is a necessary party to the suit, there can be no doubt. If the estate of Albert Banta was, by his will, converted out and out into personalty, the personal representative is the person to account, and an account must be had between the two estates.

Consequently, the decretal order which the justice at Spe-

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cial Term has made, requires the defendant Hubbell, to render an account as administrator of the estate of Albert Banta. Without, therefore, the presence of the personal representative of Albert Banta as a party, the suit is wholly fruitless and nugatory. (Story's Eq. Pl., § 102.)

Though George Hubbell is made a party defendant to the suit, it is solely and distinctly as the executor of Charles Edward Banta, and as such only has he appeared and answered. To bind the estate of a deceased party or to authorize any decree for an account against the same, it is not sufficient that the party who is the representative be a party to the suit, but he must be made a party distinctly in his representative character. This suit, therefore, is wholly defective, and for want of the presence of the personal representative of Albert Banta, cannot proceed to a decree against his estate, nor is any part of the order appealed from or any determination therein contained, binding upon such estate.

The order appealed from must, therefore, be reversed, and the cause remanded to the Special Term, with leave to the plaintiffs to apply there for permission to amend their complaint by bringing in George Hubbell as administrator *de bonis non*, with the will annexed, of Albert Banta, and also for permission to amend the complaint as to such other defects of form as they may be advised, and upon such terms as in the discretion of the Special Term may be deemed just. As this defect of parties was apparent on the face of the complaint, and as no demurrer was interposed, and apparently no suggestion of the defect was made until the argument of the appeal, neither party is to have costs of the appeal. The order will be:

Order appealed from reversed; action remanded to the Special Term, with leave to the plaintiffs to apply there for permission to amend their complaint by bringing in as a party defendant George Hubbell, as administrator of the estate of Albert Banta, and to amend the complaint in regard to such other defects of form as they shall be advised, upon such terms as may be deemed just.

Ordered accordingly.

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JOSHUA ROSEKRANS v. CORDELIA ROSEKRANS his wife, THOMAS WHITE and NANCY M. WHITE his wife, and others.

(SPECIAL TERM, MONROE COUNTY, MARCH, 1878.)

It seems section 448 of the Code was intended to retain all the provisions of the Revised Statutes in relation to the partition of lands, with the simple exception of changing it from a proceeding by petition to an action under the Code.

The wife of a tenant in common need not join as plaintiff with him in an action to partition his property. She is a necessary party, but more fittingly a defendant than plaintiff.

An objection that she is made defendant, and not a co-plaintiff, with her husband, could not avail other defendants in the action.

THIS was a demurrer to a complaint in partition upon grounds which appear in the opinion.

*M. V. Austin*, for the plaintiff.

*Mr. Rosekrans*, for the defendants, Thomas White and Nancy his wife.

RUMSEY, J. This action is commenced for the purpose of procuring the partition of certain premises described in the complaint, and if the same cannot be divided, for a sale of them.

The plaintiff is alleged to be the owner of one-half the premises, and other defendants to be the owners of the other half, in different proportions. The plaintiff's wife is made a party defendant and it is not alleged that she is the owner of any portion of the land, but it is alleged that she and the wives of other defendants, who are also made defendants, have an inchoate right of dower in the shares of their several husbands.

The defendants, Thomas and Nancy White, demur to the complaint, and assign for causes, amongst others, the following:

*Second.* There is a defect of parties plaintiff in omitting to make the plaintiff's wife Cordelia a co-plaintiff.

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*Third.* That it appears on the face of the complaint there is a defect of parties defendant by making Cordelia Rosekrans a defendant.

I have examined the defendants' authorities in this case and am of the opinion that the demurrer is not well taken. It is true that section 117 of the Code provides, "that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs," except, &c. Giving to the word "may," as used in that section, the same force as if it was the word "must," as the defendants' counsel insists, it would require that all parties having the fee of the premises sought to be divided should be made parties plaintiff, for each of them has a direct interest in the subject of the action, the land, as well as in the relief demanded, the partition of it. And such would evidently be the result but for section 448 of the Code which expressly provides that the provisions of the Revised Statutes relating to the partition of lands, shall apply to actions brought for such partition under the Code, so far as the same can be applied to the substance and subject-matter of the action without regard to its form. The provisions of the Revised Statutes in regard to partition of lands (2 Rev. St., 316, § 1), are that one tenant in common may institute proceedings *against* his co-tenants, these co-tenants having the same interest in the subject of the action, the land to be aparted, and in the relief demanded, the partition of that land. There seems to be little doubt that the 448th section of the Code was intended to retain all the provisions of the Revised Statutes in relation to the partition of lands, with the simple exception of changing it from a proceeding by petition, as it was to be by the Revised Statutes, to an action as provided for by the Code.

The wives of the several owners of the land are made parties to the action, not because they have now any direct interest in the land, nor because they will have any interest in it if it is divided. If divided, the inchoate right of dower of the wife will attach to the parcels set apart to the husband. It

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is only in case the land should in the progress of the action be sold, that it becomes necessary to have the wife a party to the action in order to have her inchoate right of dower cut off so that the purchaser may take the land divested of such inchoate right. In that case, her contingent interest in the land is transferred to the funds arising from the sale, and the court in disposing of these funds will see to it that the probable future interest of the wife therein be protected. Her presence in the action is necessary and proper only for these reasons, and it is manifest this can as well be accomplished when the wife is defendant as when she is plaintiff. The only real question before the court in the case in 8 Howard Pr. Rep. (456), was whether it was necessary to make the wife a party to the action at all, not whether she should be a plaintiff or defendant. With much deference to the learned judge who wrote the opinion in that case, I think he did not well consider the position when he suggested that the interests of the husband and wife were identical. It is evidently not so. If the land is sold, and the plaintiff in this case had no wife, he would be entitled to one-half of the entire fund arising from the sale, but having a wife she stands between him and the fund, a portion of which must be set apart to provide for her contingent right of dower, and to this extent at least the interests of the husband and wife are adverse. It was, therefore, more fitting to make her a defendant than a plaintiff.

For another reason this demurrer is not well taken. The only interest the demurring defendants have in the matter is, that all necessary parties should be made parties to the action. The plaintiff's wife is a necessary party, and she is made a defendant. She is in a position where all her rights may be finally passed upon and adjudicated, and if she does not complain of the position she occupies, the demurring defendants have no right to complain for her. They may object that persons who ought to be are not made defendants, but may not object that persons who ought not to be so, are made defendants.

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Prendergast v. Borst.

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The demurrer is, therefore, overruled; but as the defendants who demur have made the necessary affidavit, they may answer over on payment of costs.

NOTE.—This case was unanimously affirmed by the General Term of the fourth department at June term, 1878.

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LYDIA PRENDERGAST, as Executrix, &c., of JOSEPH M. PRENDERGAST, deceased, Appellant, v. ELIZABETH BORST, Respondent.

(GENERAL TERM, FIRST DEPARTMENT, JANUARY, 1878.)

A married woman, having signed a note as principal, with her husband as surety, sent her order to the payee requesting that the moneys be sent to her by the holder of the order, and they were paid thereupon to such holder.

*Held*, that although the presumption might be, from this payment, that the money was received by her, and applied to benefit her estate, yet this presumption was overcome by proof that the moneys were actually paid to the husband by the party receiving them.

*So held*, upon the authority of *White v. McNett* (33 N. Y., 371).

THE action was brought to recover the amount of two notes, one for \$1,000 made by the defendant as principal and her husband as surety, and one for \$500 made by the defendant and her husband jointly; the former was alleged to have been used for the benefit of her separate estate.

The answer admits the making of the notes and the separate estate of the defendant, but denies that the proceeds of the notes were used for the benefit of said separate estate.

The payee of the notes died in September, 1865, and the plaintiff was appointed his executrix.

The cause was tried at Special Term, by Mr. Justice CARDOZO, who dismissed the complaint.

The testimony showed that the attorney of the plaintiff's testator received from him the \$1,000 note in suit, with a letter attached, bearing the same date as the note, written by

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the defendant to the payee of the note (said testator), requesting him to send the amount thereof to her by her son, William H. Borst, who resided with her.

The son did not remember to have taken this letter to the payee, but he received from some person in the office of the payee's attorney, about this time, the sum of \$1,000, the amount of the note, and afterward delivered the same to his father.

The interest upon the two notes was paid at the office of said attorney, where the testator, who resided in the country, transacted a large portion of his business.

The defendant's son, on another occasion, received money at a lawyer's office on behalf of his mother; also did other business for her.

Judgment was entered for the defendant for costs, from which the plaintiff appealed.

*R. H. Underhill*, for the appellant.

*Hamilton Odell*, for the respondent.

Present—INGRAHAM, P. J., BRADY and LEAREN, JJ.

BRADY, J. It is conceded that the proof in this case did not justify a judgment against the defendant upon the note for \$500; but the appellant thinks the effect of the order of the defendant bearing date on the same day with the note for \$1,000, and the payment of that amount to her son in accordance with its request, shows a receipt of the money by her. If the evidence stopped there it might create a presumption that the money was received by her and applied to benefit her estate; but it did not. The defendant had no recollection of the order until it was shown her on the trial, and her son had no recollection of it. He remembered having gone to the office of Mr. Underhill, the decedent's attorney, with his father, remaining in the outer office while his father went into the inner, and that his father agreed to send him back for the money, which he did. The testimony does not establish, therefore, with any certainty, that the son received the



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money under and by virtue of the order alone. His father was the surety to the note, it will be perceived, signing it as such, and he it was who arranged for the discount or advance with the decedent or his attorney, having no communication whatever with the defendant other than such as arose from the order for the payment of the money. Viewed, therefore, in its most favorable light for the plaintiff, it was only evidence of the receipt of the money, which would remain in full force and effect until the contrary appeared. The defendant, however, testified that she signed the note for her husband at his request, and that she did not remember her son giving her any money which he received from the decedent, and the son testified that he went for the money with his father; was sent for it by him, and after receiving it gave it to him. Thus, whatever presumption might arise from the assumed receipt of the money is overcome by the proof that the defendant never received it, and this case presents elements, therefore, which bring it within the adjudication of *White v. McNett* (33 N. Y., 371). In that case Mrs. McNett was the owner of real estate which she sold, taking back for part of the consideration, bonds and mortgages. These she assigned by deed, with a covenant of guaranty by herself and husband that the money payable was collectible, and the action was brought on the covenant for its breach. It was observed at the General Term of the Supreme Court, to which the appeal was first taken, that the presumption arising upon the face of the papers was that the money was received by her, as she had with her husband executed the assignment, wherein she acknowledged the receipt of the consideration money. And in the absence of testimony to the contrary, proof that she had received the money would have been evidence of its application to benefit her estate. That presumption, however, it appears, was overthrown upon the trial by the testimony given. The person who negotiated the purchase testified that he dealt exclusively with her husband and did not see her in the transaction. On her examination she testified that none of the money came into her hands,

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and that she did not know what was done with it. It was held and determined that she was not liable on the proof given; that the plaintiff was bound to show either that there was an intention to charge her separate estate in the contract made, or that the consideration of the sale was for the direct benefit of her estate. This seems to be an extreme case, and provoked a dissenting opinion by Ch. J. DENIO in which Justice PORTER concurred, but with that we have nothing to do. In this case the dealing was exclusively with the husband. The decedent did not see the defendant. The negotiations were with the husband, and upon his contract as well as the defendant's, and the money was paid to him, none of it going into her hands. There is nothing in the note indicative of any intention to charge her separate estate, and no proof that the money was applied to its benefit. The receipt of the money acknowledged in the assignment is not less proof on that subject than the order herein considered with reference to the whole evidence in this case. For these reasons the judgment appealed from must be affirmed. The case governing our deliberations seems to be a severe application of the protection which is given to married women upon contracts arising even out of deed connected with their separate estate, but it is essential that uniformity in the administration of the law should prevail, and that slight distinctions to attain various results should be eschewed.

Judgment affirmed.

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MARTHA A. VERNON, Appellant, v. THOMAS VERNON,  
Respondent, and others, Appellants and Respondents.

(GENERAL TERM, SECOND DEPARTMENT, 1872.)

A testator gave all his real and personal estate to his "trustees and executors" named in his will, on condition that they should dispose of it as thereafter directed, then made a devise of real estate to his wife, subject in part to a power of sale in his executors, and gave her an annuity for maintenance of herself and children, payable by his executors out of

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the rents of specified real estate, or, on deficiency of such rents, from the interest of other designated property. The remaining dispositions of the will were in the form of pecuniary legacies, and the residue was not disposed of. *Held*, that the executors took only a power in trust in the real estate, and the lands to which it related descended to those otherwise entitled, subject to the execution of the trust as a power.

*Held*, also, that the trust was valid as to the personal estate.

And that the residuum, after fulfillment of the specific directions of the will, resulted to the heirs or next of kin in its original character.

*Held*, also, no intention to put the widow to her election appearing from the expressions of the will, that her right of dower, and distributive share in the personal estate were not repugnant to the will, and that she was entitled thereto in addition to other provisions for her benefit.

Also, that the intent to pass a life estate to the widow in lands devised to her was manifest from directions to the executors to invest the proceeds of a sale thereof, which they were empowered to make for her benefit, during life.

The will also provided that the balance of capital due the testator in a firm of which he was member might remain with the surviving partners for a certain time at interest. *Held*, that the executors were barred during that time from recovering the same, and that security could not be required by the court in a suit to which one of the surviving partners was not party.

THIS was an appeal by the plaintiff and certain defendants from a judgment entered on the report of a referee.

The action was brought for construction of the will of Samuel Vernon, deceased, and determination of plaintiff's claim to dower, and a distributive share in the final distribution of the testator's personal estate. The complaint also with other relief asked judgment directing the surviving partners in certain business of the testator to give adequate security for repayment of the testator's part of the capital of the firm, with interest thereon at stated periods. The will was as follows, viz.:

I give all my estate, real and personal property, to my trustees and executors hereinafter named, and their heirs, on condition, nevertheless, that they will dispose of it as hereafter instructed, by the payment of the various sums mentioned and general disposition of property as directed.

I give and bequeath to my beloved wife the house in which I reside, together with the eight lots adjoining. This pro-

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perty might be sold by my executors, in connection with the adjoining house and lots belonging to my brother Thomas, for not less than \$75,000, and my executors have full power so to do, and invest the proceeds in good securities of not less than six per cent per annum, for her benefit during her natural life.

I also give to my wife my interest in the stable-lot on Vanderbilt avenue, Brooklyn, opposite the rear of my garden.

I also give to my wife \$7,000 per annum for her life, to be paid semi-annually by my executors out of my share of rents of 65 and 67 Duane street store, and 23 Beekman street, New York, or, should that be insufficient, from the interest of other property hereinafter mentioned, for the education and maintenance of self and children. My executors have full power to dispose of either of these stores, if necessary, for sums not less than hereinafter mentioned.

The store in 23 Beekman street is jointly and equally owned by my brother Thomas and myself, and is worth \$75,000; John Barry, of Beekman street, offered that amount for it; my brother Thomas is at liberty to take it for that sum or pay it over to my executors for that amount, less the mortgage of \$20,000.

The store in Duane street cost, with elevators, fixings, &c., \$275,000, and is jointly and equally owned by my brother Thomas and myself. My executors are hereby empowered to sell the property for not less than that, or to receive it in payment for that sum, in an equitable division of the capital employed in the business, as well as real estate above mentioned.

The balance due me, employed in the business of Vernon Brothers & Co., July 1st, 1868, was \* \* \* \* \*

Out of the property above described I make the following bequests:

I give \$4,000 to my nephew, George Vernon, to be paid at the end of three years after my decease. In the event of his death before the expiration of that period, the amount must be disposed of in the manner cited for my residuary estate.

I give to my nephew, Charles Vernon, \$1,000.

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I give to my niece, Elizabeth Vernon, \$1,000, to be paid to each in three years after my decease. In the event of the death of either or both of them before that period has expired, the amount to be disposed of in the manner cited for my residuary estate.

I give to my nephews, Richard Vernon, Miles Vernon, Benjamin Vernon, Thomas Vernon, and Samuel Vernon, \$200 each, to be placed at interest one year after my decease, on good security of not less than six per cent per annum, and the interest reinvested for the benefit of the legatees, and paid to each respectively, principal and interest, on their separate attainment of twenty-one years of age. In the event of death of either, the amount to be disposed of as provided in the other cases mentioned.

I give to my brother, Miles Vernon, or his heirs, all my reversionary interest in Scotland House, Barnstable, England.

I give to my sister-in-law, Harriet Vernon, widow of my late brother, Charles Wills Vernon, thirty pounds sterling per annum during her natural life, twenty pounds of which is already secured to her as a condition of the bequest of one-third interest in Scotland House aforementioned, bequeathed to me by my late brother, Charles Wills Vernon, on the death of his wife.

The balance of my capital, due me at my decease by Vernon Brothers & Co., can remain in the hands of my surviving partners for five years, at interest at seven per cent, at the expiration of which period I desire it to be invested in good securities, bearing interest of not less than six per cent, for the benefit of my dear children, and to be distributed among them as follows:

I give to Samuel Edward Vernon, my eldest son, on his attainment of twenty-four years old, \$10,000. Frederick Richardson Vernon, on his attainment of twenty-four years of age, \$10,000.

Elizabeth Wills Vernon, \$10,000 on her twenty-fourth birthday; should she marry with the approval of her mother and my executors, the amount may be paid at her marriage.

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I give to Marion Adelaide Vernon \$10,000, to be paid in the same way as prescribed for her sister, Elizabeth.

I give to my son, Francis Joseph Vernon, \$10,000, on his attainment of his twenty-four years of age.

I give to my daughter, Frances Mary Vernon, \$10,000; and to Harriet Eveline Vernon \$10,000, to be paid each of them as directed for their sisters.

I give \$2,500 to the building fund of the Baptist Home Missionary Society, to be paid in five equal annual installments, the first installment to be paid one year after my decease.

I give \$1,000 to the Baptist Home Missionary Society.

I give \$1,000 to the Missionary Union.

I give \$500 to the Long Island Baptist Association; such amounts to be paid in five equal annual installments, commencing one year after my decease.

I give to my brother, Thomas Vernon, the picture of our great-grandfather, and the pictorial Bible formerly belonging to our late niece, Elizabeth Vernon.

This I declare to be my last will and testament, and name as my executors and trustees, my brother, Thomas Vernon, and my brother-in-law, Edward Richardson, M. D., of Brooklyn, this 1st day of September, 1868.

SAMUEL VERNON.

Witnesses, &c.

The referee made the following findings of fact and law, viz.:

"That Samuel Vernon, the testator mentioned in the complaint, resided, prior to his death, at 201 Lafayette avenue, in the city of Brooklyn, and that he died at his said residence on the 23d day of September, 1870. That prior to his death he duly made, published and declared his last will and testament, a copy of which is contained in the complaint.

"That said will was duly admitted to probate by the surrogate of said Kings county, on the 12th day of October, 1870, and letters testamentary issued to Thomas Vernon and Edward T. Richardson, as executors.

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"That said testator left him surviving his widow, who is the plaintiff in this action, and six infant children, whose names and ages are as stated in the complaint.

"That Harriet Eveline Vernon, mentioned in the said will, died before the death of the testator, aged about two years.

"That said testator died seised and possessed of both real and personal property.

That his real estate was as follows :

"1st. The house in which he resided, known as No. 201 Lafayette avenue, Brooklyn, with about eight lots of land, being 100 feet by 198 feet in size.

"2d. A lot land in Vanderbilt avenue, Brooklyn, opposite the rear of the first mentioned premises.

"3d. An undivided one-half of the store, known as No. 23 Beekman street, in the city of New York, of which the other half is owned by Thomas Vernon, the brother and one of the executors of the testator, and one of the defendants herein.

"4th. An undivided one-half of the store, known as Nos. 65 and 67 Duane street, in said city of New York, running through to Pearl street, and also fronting on Elm street, the other half of which is also owned by the said Thomas Vernon.

"That the above was all the real estate standing in the name of the testator at the time of his death.

"That at the time of the testator's death, the firm of Vernon Brothers & Co., of New York city, of which the testator was a member, owned a certain paper-mill property at Northampton, Massachusetts, which is included in the statement of testator's interest in the capital of said firm, hereinafter mentioned.

"That the testator had, at his death, a reversionary interest in the property known as "Scotland House," at Barnstable, England, mentioned in said will.

"That there was, at testator's death, a mortgage of \$20,000, executed by the testator, upon the house and eight lots above mentioned in Lafayette avenue, Brooklyn ; also a mortgage, executed by the testator and said Thomas Vernon, jointly, of \$20,000 upon the said store property No. 23 Beekman street ;

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also a mortgage, executed by the testator and said Thomas Vernon, jointly, of \$75,000 upon the said store property Nos. 65 and 67 Duane street, and that said mortgages are still outstanding and are liens upon the said premises respectively.

"That there is no encumbrance upon the said stable-lot in Vanderbilt avenue, and that the same is worth from \$3,000 to \$4,000.

"That the testator's interest in the capital of the firm of Vernon Brothers & Co. was from \$175,000 to \$190,000, including the mill property at Northampton, Massachusetts. Said Northampton property is worth from \$75,000 to \$100,000.

"That the testator possessed at his death, besides his interest in the capital of his firm, personal property not exceeding in value the sum of \$4,000.

"That the testator's personal property, except the said \$4,000, was all in the firm business and invested or employed therein.

"That the testator was indebted, at his death, apart from partnership and mortgage debts, to about \$8,000.

"That the net annual rents of said two stores amount to about \$13,180, subject to fluctuations, and of which one-half belongs to said Thomas Vernon.

"That the store in Duane street is worth about \$275,000, and the store in Beekman street about \$75,000.

"That Harriet Wills Vernon, mentioned in the will, is from fifty to sixty years of age.

"That the surviving partners of the testator are said Thomas Vernon and David Scott.

"That the survivors of Vernon Brothers & Co., the firm of which testator was a member, continue the same business, viz., the manufacture and sale of paper, and are running the said paper-mill at Northampton."

I find the following conclusions of law :

"*First.* That the executors named in the will took an estate, as trustees under the first clause in the will, in the testator's property, real and personal.

"*Second.* That the widow (plaintiff) takes the house in



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Lafayette avenue, Brooklyn, and the eight lots adjoining, mentioned in the will, in fee, subject to the mortgage for \$20,000 above mentioned, and subject to a contingent power of sale in the executors.

"*Third.* That she takes the lot in Vanderbilt avenue, Brooklyn (called the stable-lot), in fee.

"*Fourth.* That she takes the annuity of \$7,000.

"*Fifth.* That the above mentioned provisions for the widow (plaintiff), in the will, are in lieu of dower and thirds.

"*Sixth.* That the testator, in authorizing the executors to lend his interest in the firm to the survivors thereof, intended that such loan should be without security.

"*Seventh.* That the testator did not die intestate as to any part of his personal property, all of which, subject to the provisions of the will, is bequeathed to his children.

"*Eighth.* That there was not an equitable conversion of the realty into personalty, or of personalty into realty, as to the two store properties in Duane and Beekman streets, under the provisions of the will relative to the disposition of those properties.

"*Ninth.* That Thomas Vernon should make the election granted to him in the will, as to said two store properties, within six months after the entry of judgment in this action, after which period his right to so elect should cease.

"*Tenth.* That the plaintiff should have a decree and judgment in this action in accordance with the above conclusions of law, and that the costs of the several parties to this action be paid out of the fund."

Exceptions to the referee's findings were taken in due form, the character of which sufficiently appears from the opinion of the court.

*W. P. Richardson* and *Geo. P. Reynolds*, for the appellant. The executors take no estate under the will in the real estate. (1 Ed. Stats., 678, §§ 55, 56; *Fowler v. Depau*, 26 Barb., 224; *Depeyster v. Clendenning*, 8 Paige, 295; *Smith v. Post*, 2 Edw. Ch., 523; *Waldron v. McComb*, 1 Hill, 111; *Germond*

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v. *Jones*, 2 id., 573; *Scott v. Monell*, 5 N. Y. Sur., 431; Jarman on Wills, 465; *Tucker v. Tucker*, 1 Seld., 408; *Manice v. Manice*, 4 Hand, 303, 364.) The provisions for plaintiff are not in lieu of dower. (2 Edm. Stats., 510; 1 id., 691, §§ 16, 1, 13; *Adsit v. Adsit*, 2 John. Ch., 448; *Lewis v. Smith*, 5 Seld., 502; *Smith v. Kniskern*, 4 John. Ch., 9; *Jackson v. Churchill*, 7 Cow., 287; *Wood v. Wood*, 5 Paige, 596; *Havens v. Havens*, 1 Sandf. Ch., 324; *Mills v. Mills*, 28 Barb., 454; *Fuller v. Yates*, 8 Paige, 325; *Irving v. De Kay*, 9 id., 521; *Lewis v. Smith*, 11 Barb., 152; 5 Seld., 502; *Learned v. Steele*, 4 id., 20; *Lasher v. Lasher*, 13 id., 106; *Dodge v. Dodge*, 31 id., 106; *Tobias v. Ketchum*, 36 id., 304; *Sanford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Denio, 430.) Her dower and third are not repugnant to the provisions of the will. Both can stand together.

Store in Beekman street, worth.....	\$75,000
Store in Duane street, worth .....	275,000
	<hr/>
	\$350,000
Less mortgages .....	95,000
	<hr/>
	\$255,000
One-half is.....	\$127,500
Income, at six per cent, is.....	\$7,650
Deduct one-third for dower.....	2,550
	<hr/>
Income to the estate.....	5,100
	<hr/>
Personal property:	
Cash capital .....	\$190,000
Less legacies .....	\$12,000
Less legacies (children) .....	60,000
	<hr/>
	72,000
	<hr/>
	\$118,000
Thirds off .....	39,333
	<hr/>
	\$78,660
	<hr/>

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Income, at six per cent on \$78,660.....	\$4,719 96
Add income on real estate.....	5,100 00
	<hr/>
	\$9,820 00
Deduct allowance.....	7,000 00
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Surplus .....	<u>\$2,820 00</u>

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The balance of testator's capital, if retained by the testator's surviving partner, should be secured. (*Lefevre v. Larroway*, 22 Barb., 167; 2 Story Eq. Juris, §§ 1334, 1337.) The testator died intestate as to one-half of the two store properties, and as to the balance of cash capital; after payment of debts and legacies the lands descended, subject to the charge for the allowance of \$7,000 and the power of sale. The residuum is liable to distribution, and the plaintiff is entitled to one-third. (Wigram on Inter. of Wills, 9; *Mann v. Mann*, 14 John., 1; *Idé v. Idé*, 5 Mass., 500; *Norris v. Beyea*, 3 Kern., 273; *Jackson v. Robins*, 15 John., 169.) The plaintiff took the house and lots devised to her in fee. (1 R. S., 748, § 1; *Fowler v. Depau*, 26 Barb., 224; *Helmer v. Shoemaker*, 22 Wend., 137.)

*J. W. Howe*, for the guardian *ad litem*, &c. The court should require that the amount due to the testator's estate, by his surviving partners, should be properly secured or be paid over. (*Payne v. Matthews*, 6 Paige, 20; *Eagleton et al. v. Kingston*, 8 Ves. Ch. R., 467; *Styles v. Guy*, 1 Mac. & Gordan Ch. R., 422; 1 Hall & Tevell, 523; *Egbert v. Butler*, 21 Beavan, 560; *Candler v. Tillett*, 22 id., 257; *Mucklow v. Fuller*, Jacobs R., 198; Perry on Trusts, 398, 399, 408, 409, 411, 425; *Booth v. Booth*, 1 Beavan, 125; Lewin on Trusts, 250; Hill on Trustees, 380; Willard Eq. Jur., 613; *Wilkes v. Steward*, Cooper's Cas. in Ch., 6; *Bullock v. Wheatley*, 1 Collyer Ch., 130; *Morrissey v. Foley*, 2 Molloy, 346; *Evans v. Flight*, 2 Jurist, 818; *Gardner v. Gardner*, 1 id., 402; *Holmes v. Druig*, 2 Cox Cases, 1; *Smith v. Smith*, 4 John. Ch., 281; *Cummins v. Cummins*, 3 Jones &

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Latouche, 64; *Powell v. Evans*, 5 Ves., 839; *Depuyster v. Clarkson*, 2 Wend., 871; *Hamphill's appeal*, 18 Penn. St., 303; *Pray's appeal*, 34 id., 100; *Kimball v. Reading*, 11 Foster [N. H.], 352; *Gray v. Fox*, Saxton Ch., 259; *Pocock v. Redington*, 5 Ves., 797; *King v. Talbot*, 40 N. Y., 76; *Townsend v. Townsend*, 1 Gifford, 211; *Ackerman v. Emott*, 4 Barb., 626; *Brown v. Higgs*, 8 Ves., 574; *Att'y-Gen'l v. Downing*, Wilm., 23; *Wedderburn v. Wedderburn*, 4 Mylne & Craig, 41.) No estate in the land vested in the executors under the will. (*Manice v. Manice*, 43 N. Y., 303; *Post v. Hover*, 33 id., 599; *Tucker v. Tucker*, 5 id., 408; *Scott v. Monell*, 5 N. Y. Sur., 431; *Downing v. Marshall*, 23 N. Y., 377; *De Kay v. Irving*, 5 Denio, 653; *Smith v. Post*, 2 Edw. Ch., 523; *Germond v. Jones*, 2 Hill, 573; *Hawley v. James*, 16 Wend., 148; *Lorillard v. Coster*, 14 id., 320.)

*S. P. Nash*, for the executors. Legal estate in the real and personal property vested in the executors. The trusts created by the will could not otherwise be performed. (*Bradley v. Amidon*, 10 Paige, 235; *Brewster v. Striker*, 2 Comst., 19; *Tobias v. Ketchum*, 319.) The devise of dwelling and lots to widow is of a life estate. (3 R. S. [5th ed.], 38, §§ 1 and 2; 4 Kent Com., 535, 538.) The claim of dower and thirds is not consistent with the will, and, if allowed, will defeat the purpose of the testator. (4 Kent Com. [2d ed.], 58; *Adsit v. Adsit*, 2 John. Ch., 448, 451; *Sanford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 5 Hill, 206; *Savage v. Burnham*, 17 N. Y., 561; *Tobias v. Ketchum*, 32 id., 319.)

By the Court—GILBERT, J. By the first sentence of the will the testator gave all his estate, real and personal, to his trustees and executors therein named, and their heirs, on condition that they should dispose of it as thereafter directed by the will. Next he made a formal devise to his wife of a portion of his real estate, subject as to one parcel to a power of sale with which he invested his executors. He then gives his wife an annuity for the maintenance and education of herself and her children, payable by his executors out of the

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rents of certain specified real estate, or, if they should be insufficient, from the interest of other property thereafter mentioned. The other dispositions of the will are in the form of pecuniary bequests to his children and other relatives. The will contains no directions with respect to the residue of the testator's property after the specific directions shall have been fulfilled.

The language of the gift to the executors, contained in the first clause, is sufficient to raise a trust in them (Perry on Trusts, § 112, *et seq.*), but under the provisions of the Revised Statutes, relative to uses and trusts, such trust is not valid as a trust of the real estate. But the trust is valid as a power in trust by virtue of the fifty-sixth and fifty-eighth sections of the statute aforesaid, and under the fifty-ninth section of the same statute the lands to which the trust relates descend to the persons otherwise entitled, subject to the execution of the trust as a power.

It was suggested on the argument that the legal estate in the testator's property was vested in the executors and trustees named in the will, because the trusts in the will could not otherwise be performed. We are of opinion that all the objects mentioned in the will can be accomplished under a power. The general object of this power is the disposition of the estate to or for the benefit of the beneficiaries named in the will, according to the directions therein contained. It includes a power of sale, and a power to purchase the share of a portion of the real estate, which belonged to his brother and himself as tenants in common, at a specified price. It is not necessary to enumerate each particular object embraced within the power. It is sufficient to say, that there is no apparent necessity for holding that the executors must be vested with the legal estate, in order to carry out the objects of the will. In such a case the legal estate does not vest in them by implication. (*Tucker v. Tucker*, 1 Seld., 408; *Manice v. Manice*, 43 N. Y., 304.)

The trust as to the personal property is valid, and such property remains vested in the executors charged with the

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trust declared in the will. Practically, therefore, the beneficiaries are quite as well protected as they would have been under a will more formally written. The real estate is vested in them according to their respective interests, subject only to a power, which can be exercised only for their benefit, and the personal property is vested in the trustees upon a trust which gives them all the beneficial interest.

With respect to the residuum which may remain after the trustees shall have fulfilled the specific directions contained in the will, it will result to the heirs or next of kin, as the case may be, in its original character (*Perry on Trusts*, § 152; *Roper v. Radcliffe*, 9 Mod., 171); for there is nothing in the will indicating an intention to benefit the trustees, and a declaration of trust as to part is considered sufficient evidence that the testator did not intend the trustees to take any beneficial interest, and that the creation of the trust was the sole object of the transaction.

We think the referee erred in deciding that the provisions of the will in favor of the widow were in lieu of her dower in the lands of the testator, and of her distributive share in his personal estate after the payment of debts and legacies. The will contains no expression to that effect, nor is her claim of dower and thirds inconsistent with the provisions for her benefit. The widow is entitled to retain her dower and all other benefits given her by the will, unless the retention of her dower operates to defeat some other disposition in the will. (*Adsit v. Adsit*, 2 J. C. R., 448; *Sanford v. Jackson*, 10 Paige, 266; *Lewis v. Smith*, 5 Seld., 502.) The provisions of the will must be such as to clearly indicate the intention of the testator, that the widow shall be put to her election. The presumption is, that the testator intended that she should have his gifts under the will in addition to her dower, unless the contrary is manifest from the will. (*Dodge v. Dodge*, 31 Barb., 413.) We are unable to discover anything indicating an intention of the testator that the widow should be put to her election. On the contrary, it has been satisfactorily shown by the plaintiff's counsel, in a table

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presented by him, that allowing the widow her dower and thirds is not repugnant to or inconsistent with any other provision contained in the will.

The devise, to the widow, of the house in which the testator resided, and the eight lots adjoining, should be construed as a gift of a life estate only; for although words of inheritance are no longer requisite to create an estate in fee, yet the statute which changed the rule of the common law on this subject is, by its terms, rendered inoperative where the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the devise (1 R. S., 748, § 1); and we think such intent is abundantly manifested by the provision which directs the executors to invest the proceeds of the sale, that the will empowers them to make, for the benefit of the widow during her life.

We are unable to discover any authority for the executors to demand the payment to them of the amount due the estate from the surviving partners, and certainly the court cannot in this suit make any decree requiring such surviving partners to give security for the payment of, or to pay, the debt, for one of them is not a party to the suit. The will in effect directs that the surviving partners may withhold payment of that debt for five years, paying in the meantime interest at seven per cent. This is an effectual bar to a suit for the collection of the demand, and of course affords protection to the executors against any liability for not collecting it.

The judgment below must be modified in accordance with this opinion. The several parties to this appeal are entitled to their costs, to be paid by the executors out of the fund in their hands.

Judgment accordingly.

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Bain v. Brown.

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MARY BAIN, Executrix, &c., Respondent, v. EBENEZER H. BROWN, Appellant.

(GENERAL TERM, FIRST DEPARTMENT, 1872.)

The plaintiff made a contract to sell his real estate upon the advice of his agent. Some two days after the latter took an assignment from the vendee and made a new contract for sale to other purchasers at an increased price. He then informed the plaintiff that his (defendant's) assignor had sold the property to the last vendees, and, suppressing the price, obtained from him a deed, with consideration in blank to be filled in, to the purchasers. *Held*, that the defendant's confidential relation to the plaintiff continued until after the execution of the deed, and that the plaintiff was entitled to the benefit of the increased price.

THIS was an appeal by the defendant from a judgment entered upon the report of a referee in favor of the plaintiff. The facts appear in the opinion.

*John H. White*, for the respondent.

*Erastus Cooke*, for the appellant.

Present—INGRAHAM, P. J., and FANCHER, J.

FANCHER, J. The plaintiff's testator, James Bain, was, in April, 1867, and for several years prior to that time, the owner in fee of two lots, and buildings thereon, in Fifth street, in the city of New York, and, also, of certain leasehold property on the same street, comprising three other lots and buildings thereon; and he continued to own the same until the 16th April, 1867, when a contract to sell the property to John Ludlow was executed.

The testator was a resident of Philadelphia; and the defendant was engaged in the business of a real estate broker in the city of New York. For some time anterior to the contract the defendant acted as the agent of the testator in respect of the property, had the care and management of the same, and collected and paid over to the testator the rents of the premises.



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On the 6th April, 1867, the defendant wrote a letter to James Bain, the testator, in which he stated, in substance, that the houses in question would need considerable expenses put upon them; that the fee of the leasehold premises could not be obtained for some years, and that he thought there was a party who would buy the property if he, the said Bain, would take \$17,000 therefor; \$5,000 to be paid in cash on or before the first day of June, and the balance by a mortgage for \$12,000, payable in three years, with interest. The defendant did not, at that time, disclose the name of the proposed purchaser. On the 12th day of April, 1867, the defendant again wrote to Bain, stating that he had not rented the houses for another year; that the offer he had sent was the best ever made to him for the property; that the houses would need repairing and painting; that the health board were very rigid about yards, sinks and cess-pools, and were requiring each house to be connected with the street sewer; and that he advised a sale at the best offer they could get. It does not appear what reply, if any, Bain made to this communication; but it appears that he saw the defendant in New York on the 15th of April, 1867; and that on the 17th day of April, 1867, the defendant again wrote to Bain, stating that he had sold the property to Mr. John Ludlow for the price of \$17,000; that he had signed the contract for Bain, and received \$500 on account; also stating how the \$17,000 were to be paid and secured, and that in due time the defendant would prepare the deed and assignments, and also the bonds and mortgages if he desired it. It was on the 16th day of April, 1869, that the defendant executed and delivered the contract with said Ludlow, signing the name of James Bain thereto "per E. H. Brown;" and he testifies that on that day or the next day he forwarded a duplicate thereof to Bain at Philadelphia for execution, who brought it back to New York, where it was also executed by Bain.

According to this testimony Bain could not have received the contract and returned to New York with it, so as to have signed it in New York earlier than the seventeenth or

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eighteenth of April, and it was perhaps later; yet Frankenheim swears that he saw the defendant on the subject of this property at his office, 121 Nassau street, on the eighteenth of April, and asked him about the property. He testifies that the defendant then said the houses were for sale; and, being asked the price, answered \$25,000 for the five houses. Frankenheim swears he saw the defendant the next day, and defendant said to him and his partner on that occasion, at their store, that the property had been sold, but that the purchaser, Mr. Ludlow, had authorized him to sell the same again at a profit; that Ludlow had purchased the same at \$25,000, and that he, the defendant, would sell the property on behalf of Ludlow for \$26,000. Frankenheim and his partner, Kellner, then, on the nineteenth of April, paid the defendant \$500, for which he gave a receipt; and, afterward, a written contract, dated the 22d day of April, 1867, for the sale of the property to Frankenheim & Kellner for \$26,000, was executed, signed by them and the defendant. This contract is between the defendant of the one part, as seller, and Frankenheim & Kellner, of the other part, as purchasers.

The defendant denies that he told Frankenheim on the nineteenth of April that he had sold the property to Ludlow, and he denies that he told him he had sold the property for \$25,000; but, giving the defendant the benefit of these denials, he does not deny the sale to Frankenheim & Kellner for \$26,000, as stated by them; nor that the bargain with them was made on the nineteenth, and the contract executed on the twenty-second of April.

It appears that, on the same twenty-second of April, an assignment was made to the defendant by John Ludlow of his contract; and thereafter, on the 7th day of May, 1867, the defendant wrote to Bain stating that Mr. Ludlow had sold his purchase of the Fifth street property to a couple of Germans, Frankenheim and Killner; that they wished to repair the property and did not like to do much until the title was passed; and in that letter the defendant also uses this language: "They therefore propose to take title before

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the first of June and pay you the money due you. They are to execute mortgages and carry out all the conditions about the bonds and mortgages that are in contract with Mr. Ludlow." On the twenty-second of May the defendant wrote to Bain another letter, inclosing the deed and assignments for execution, and accompanied the same with a copy of the first contract with Ludlow. In that letter he said: "The amount of consideration money can be filled in, when delivered, and the division of the amount (\$17,000) can be made between the deed and the assignment of the leases." The deed was accordingly executed and delivered, and it is not pretended that Bain was ever informed by the defendant or any other person of the sale for \$26,000, until after the delivery of the deed by him and the closing of the transaction, so far as Bain was concerned, on the basis of a sale at \$17,000.

The very statement of the facts of this case carries with it a cogent argument against the defendant. In his letter to Bain of the 7th of May, 1867, he treats Frankenheim and Killner as in privity with Bain, and says: "Ludlow has sold his purchase to a couple of Germans, Frankenheim and Killner; they propose to take title before the first of June, and pay you the money due you." There was no suggestion then that defendant had purchased Ludlow's contract for himself, nor that the defendant was to receive payment for himself from Frankenheim and Killner; nor that the defendant, as principal, was to settle with Bain on the terms of the Ludlow contract. The defendant was an agent of Bain in respect of the sale of the property; and, having undertaken to act for him in the matter, could not act in the same matter for himself until his agency ceased. This principle is conceded by the counsel for the defendant, but he contends it has no application to this case for the reason that the agency of the defendant ceased on the execution of the contract with Ludlow.

But the facts of the case negative this assumption. The defendant himself did not act towards Bain nor write to him in such a way as that Bain could have understood the

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defendant considered his agency terminated. On the contrary, the defendant, as agent of Bain, retained the Ludlow contract until he forwarded it to Bain with the deed and assignments in May. He also wrote to Bain the letters already referred to, using such language as plainly imported his agency, and directly asserted the privity between Bain, as vendor, and Frankenheim and Killner, as purchasers.

It is clear that the defendant had a duty to perform, as the agent of Bain during all this time, in respect of the sale of the property, which duty had not terminated when he attempted to act for himself. His employer was entitled to all his skill and service touching the sale of the property, and to the benefit of any bargains he could make respecting it, as well as any advantages growing out of the agency. The defendant all the time, up to the execution of the deed by Bain, stood in such a relation of confidence to him as to impose upon the defendant the utmost degree of good faith and fair conduct. "*Nemo potest in rem suam auctor esse, qui negotia aliena gerunt.*" There was a duty of fidelity to the confidence which Bain had reposed in the defendant, that was inconsistent with his becoming a purchaser and seller of the property for himself. The law delivers him from temptation in such a case, and will not sanction a breach of the confidence which the defendant has voluntarily assumed. Were the law otherwise, the door would be open to much injustice; for the principal, without warning or notice of the change of relation of his agent, would not himself exercise the vigilance necessary to protect his interests. In such a case it is not necessary to inquire whether or not the agent was actuated by any fraudulent purpose. His fiduciary relation prevents him from assuming to himself any advantages of bargains touching the subject of his agency. (*Conkey v. Bond*, 36 N. Y., 427; *Gardner v. Ogden*, 22 id., 327.)

We think the judgment entered on the report of the referee should be affirmed.

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Tryon v. Baker.

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DAVID TRYON, Respondent, v. JEREMIAH F. BAKER, Appellant.

(GENERAL TERM, FOURTH DEPARTMENT, JANUARY, 1873.)

Where a wrong-doer sells property illegally taken, the owner may waive the tort and sue for money had and received; and where the property taken is money, it may be recovered in such an action without waiting for the formality of a sale.

It may be assumed, in order to sustain a judgment rendered upon the report of a referee, that a finding of fact was sustained by evidence given upon the trial, although such evidence does not appear in the case on appeal.

THIS was an appeal from a judgment entered on the report of referees. The facts are stated in the opinion.

*H. A. Maynard*, for the respondent.

*Rollin Tracy*, for the appellant.

Present—MULLIN, P. J., TALCOTT and E. D. SMITH, JJ.

MULLIN, P. J. This action is brought to recover sixty-five dollars, money deposited with defendant by plaintiff, to be returned when called for, and also to recover eighty-five dollars for the work, labor and services done and rendered by the plaintiff for the defendant. The defence is,

1st. A general denial.

2d. That the money was paid to and the work done for the defendant under a special agreement between the parties that plaintiff should deliver to defendant \$1,000 in money, and render services to and for defendant during the residue of his, plaintiff's, natural life, and in consideration thereof defendant would support him (the plaintiff) during the rest of his life; that defendant had kept and performed his part of the agreement, but that plaintiff had failed to perform it on his part, and that by reason thereof defendant had sustained

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damages which he insisted upon by way of recoupment or counter-claim.

The defendant alleged that he had paid plaintiff twenty dollars. On the trial, before three referees appointed by the court, the plaintiff was examined as a witness in his own behalf, and testified that he lived with defendant, the last time in the spring of 1867; they wanted him to live with them as long as he lived. Mrs. Baker told him defendant would give him a life lease; he told them he would go down to Scholarie and bring up his things, and he did. He brought sixty-five dollars in money and some notes and gave them to Mrs. B. to take care of for him. She afterward told him defendant had used the money. He worked there through that summer and until spring of the following year, and left in March, 1868. Mrs. B. said he must try and get another home. Baker did not seem to want to keep him. Defendant said he could not stay any longer. One of the notes he gave Mrs. B. was for \$600 or \$700, another for twenty dollars, and another for fourteen dollars; the notes were good.

The plaintiff gave evidence tending to prove his services worth, besides his board, eight dollars per month.

One Conklin testified that defendant told him plaintiff had been living with him, but he had come to the conclusion he would not have him any longer.

The defendant was examined in his own behalf, and testified that it was agreed that in consideration that defendant would support plaintiff during the rest of his life he would pay him \$1,000, and perform such labor as he was able. That the sixty-five dollars was delivered to defendant's wife, and the labor plaintiff performed was performed under that agreement. Plaintiff never paid the \$1,000, and left without performing his part of the agreement. The defendant performed his part of it. The plaintiff's services were not worth his board. His board was worth four dollars per week a part of the time he lived at defendants, and three dollars per week for another part.

Plaintiff was a man sixty years of age, lame and unable to

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do much work; defendant paid him twenty dollars. Other evidence was given tending to prove plaintiff's services were not worth his board.

The referees find that previous to 16th April, 1867, the plaintiff and defendant negotiated for an agreement by which defendant was to give plaintiff a written contract to support plaintiff during his natural life, and plaintiff in consideration therefor was to labor for defendant as much as he was able, and also give him what property he had, amounting to nearly \$1,000.

That plaintiff handed to the wife sixty-five dollars in currency, and promissory notes to between \$600 or \$700, for safe keeping till the above contract should be executed.

The defendant appropriated the sixty-five dollars to his own use. The agreement in writing was never executed by defendant, and the proposed contract was never consummated. That plaintiff worked for defendant till he was expelled by defendant from his premises, whereupon plaintiff demanded his money and pay for his work.

They also found that defendant was not liable to plaintiff in any amount for work and labor. That plaintiff was not liable to defendant for board, &c., in any sum. That defendant was liable for sixty-five dollars, less twenty dollars paid, leaving due forty-five dollars, which with interest to date of report amounted to fifty-three dollars and forty-five cents.

For this amount judgment was entered, and from that judgment the defendant appeals.

The referees find that a verbal agreement was made, by which plaintiff was to pay to defendant \$1,000, and do such work as he was able for defendant during his life, and the defendant in consideration thereof agreed to support him. Such agreement not to become obligatory until reduced to writing and executed by defendant.

No such agreement is proved by the evidence contained in the case. We must, therefore, assume in support of the judgment that there was evidence given before the referees not contained in the case.

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The defendant did not prove the contract to be reduced to writing, and hence no agreement was ever concluded by which the parties were bound.

Had the plaintiff paid money or rendered services in anticipation of the contract being made so as to bind the parties, he would have been entitled to recover back the money and to recover for his services when the defendant failed to procure it to be reduced to writing.

If the contract had been concluded, the defendant violated it by turning the plaintiff away from his house.

It is not necessary to inquire whether the defendant would be liable for the sixty-five dollars left with Mrs. Baker for safe keeping. The defendant appropriated it to his own use and was liable to the plaintiff in trover for it.

The plaintiff was not bound to sue in trover; he could waive the tort and recover on the agreement implied by law to repay the money. It cannot be said to be settled by adjudication, that the owner of property wrongfully appropriated can waive the tort and recover on an implied contract of sale. When, however, the wrong-doer sells property illegally taken, the owner may waive the tort and sue for money had and received. (*Harpending v. Shoemaker*, 37 Barb., 270-291, and cases cited.)

It would seem to follow that where the property taken is money, it might be recovered in an action for money had and received, without waiting for the formality of a sale of it, an event which would not be likely to occur.

The property taken in this case was money, and the right of recovery would seem to be perfect. The judgment is right as to the money.

The referees find that plaintiff's services were worth no more than his board while he lived with defendant, and therefore they refused to allow him anything for such services.

The finding that no agreement was concluded between the parties disposes of any claim on the part of the defendant for damages for breach of the contract. He was allowed for the money paid to the plaintiff in reduction of the money



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taken by him, and thus the rights of the parties seem to have been properly adjusted.

There are a multitude of requests that the referees find certain facts, some of which it is possible they might and perhaps ought to have found. But the findings made are supported by the evidence, and findings on collateral points could not change the result.

The judgment should be affirmed.



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## PROCEEDINGS

OF THE

MONROE AND CAYUGA COUNTY BAR

COMMEMORATIVE OF THE DEATH OF

### MR. JUSTICE THOMAS A. JOHNSON.

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At a meeting of the Monroe county Bar, at Rochester, on the 7th December, 1872, Hon. E. DARWIN SMITH was called to preside and F. A. MACOMBER, Esq., appointed secretary.

Hon. GEORGE W. RAWSON, Hon. J. D. HUSBANDS, J. N. POMEROY, H. L. SARGENT, L. H. HARVEY, T. C. MONTGOMERY and GEORGE RAINES, Esqrs., were appointed a committee to prepare resolutions, expressive of the sense of the meeting, regarding the late Justice JOHNSON.

The following addresses were then made, viz. :

Judge CHUMASERO said :

Mournful, indeed, Mr. Chairman, is the event which has again convened the Bar of Monroe county. Sad enough is it, when we are called to deplore the loss of any friend or brother, but a loss like this seems to evoke our special grief. Judge Johnson, whom we all loved for his many and ennobling virtues, is dead. How were our hearts chilled, as yesterday we heard the "passing bell," in its funeral tones, proclaim the solemn truth that Johnson was dead ! Truly, "Death loves a shining

mark," and when this time the "insatiate Archer" sped the fatal shaft he chose no common victim. How little did we dream, when a few short weeks ago, we saw him in the full vigor of his manhood, strong in health and energy, that we should so soon be called to mourn him, dead. But his fate is our own; it comes alike to all; no power, nor place, nor strength, nor life, can stay its arm or parry its relentless blow. All must fall before it; all must die.

"Pallida Mors

*Æquò pulsat pede, pauperum tabernas*

*Regumque turres."*

Before the bier of him whom we now mourn, the voice of eulogy is dumb. His name is his epitaph. Those who knew him never can forget what "manner of man he was." As a judge, he was all that could be asked for; great in both mental and physical stature, he seemed peculiarly adapted to the position he had for so many years so ably and eminently filled. His legal ability was great; spurning the close technicalities of the law, when, in so doing, he was not compelled to violate any substantial principle, imbued with a stern love of strict justice, he delighted, during a trial, as it were, to dive into the very depths of the case, and bring up from intricacy and confusion, the very merits of the controversy. It was his aim and stern resolve that right should triumph, and many a time, when he was on the bench, did the trickster, confident of success at the commencement of the case, retire crestfallen at its determination. As a circuit judge, he was admirable, detesting fraud and chicanery in all its forms, and rendering them bare and powerless whenever he detected them, he was equally determined in the full enforcement of equity and justice. His uniform urbanity and kindness on the bench, marked him as the true gentleman. No young or inexperienced practitioner was afraid to appear before Judge Johnson; timidity, awe, bashfulness, were disarmed, and the young lawyer in his novitiate had, before him, as sure a standing in court as the oldest veteran. Indeed, the remark was common, that the senior members of the Bar looked upon him as a brother, the junior members as a father. He had a big heart, and it pulsated nobly; he had large sympathy, and he did not fail to express it. He told me once, when compelled by the duties of his station to pass sentence of death upon a convicted murderer, that sooner, almost, than do it, he felt as

though he could cheerfully resign his office—and yet he was no man to falter in the stern path of duty. As a man, a citizen and a Christian gentleman, he was above reproach; indeed, integrity and pureness of heart were the grand and leading characteristics of his noble nature.

“None knew him but to love him,  
None named him but to praise.”

I am not permitted to draw aside, just now, the sacred veil of domestic grief, but I may say that, as a husband and parent, he was all a wife could pray for, or a child could ask. But death is not all darkness. We mourn—not he. Firm in the true Christian faith, he had assurance of eternal bliss, and the earthly, doubtless met the Heavenly Judge, not as a trembling culprit, but in the full welcome of a “good and faithful servant.”

JAMES C. COCHRANE, Esq., said :

*Mr. Chairman.*—Having been admitted to the Bar the year before Judge Johnson was elevated to the bench, having resided in the same district ever since, and practiced to some extent, in many of the courts in which he took a part, I have had an opportunity, in common with other members of the profession who have practiced at this Bar for a good many years, to understand intimately and well the judicial character and standing of Judge Johnson ; and we come here to-day, not to pay him any empty tribute, or to speak as a matter of form, in regard to the really great man who has been suddenly called upon to leave the bench and the world. Judge Johnson had attributes which are requisite to every great judge. All concede him to have been, taken in almost every respect, one of the ablest judges we have ever had in western New York ; and it is only proper to say, here, that where other judges stand so high this is saying a great deal of Judge Johnson. He had a fund of common sense; he was a practical man; he knew mankind, and he brought these qualities with him to the bench. No judge was ever truly great who had not a large fund of common sense, and the possession of this quality tended, in no slight degree, to render him eminent as a circuit judge. In the trial of causes, questions arise every hour, which a judge is called upon to decide without an examination of precedents, where he has to rely upon his own reason and upon his own common sense ; and it is sufficient to say that many of Judge Johnson's decisions at the circuit were carried

by appeal to the highest court, and that there is no judge whose standing upon the record, as reviewed by other courts, is better than his. We find in the reports of the higher courts a great many cases where Judge Johnson presided at the circuit, and where his decisions were affirmed and have become the settled law of the State. He was eminently fair in his charges to the jury; I have never heard any one complain of partiality. No one could say that Judge Johnson was upon one side or the other of a case, but it was his anxious desire to present the facts fully and fairly and honestly to the jury, thus securing to the parties, in an eminent degree, that justice which it should be the object of court and counsel to obtain.

Judge Johnson had another attribute essential to every good judge; it was that of patience. There is reason for judges becoming tired, irritable, vexed, in the course of trials and arguments; but, at the same time, a judge must remember that counsel in a case understand the particular cause better than the judge. A case that has been in the hands of counsel for years, perhaps, carefully and thoroughly examined, is brought before the court; and it is not to be expected that the judge can know, in advance, what counsel are presumed to know, and therefore, although the counsel may be greatly inferior to the judge, yet there are few cases where the court cannot learn something in regard to the particular case, from counsel who present it. Judge Johnson was always willing, as the gentleman who preceded me said, to listen to the youngest counsel who came before him—to listen patiently and attentively, and after having thus listened, he gave a decision which was generally satisfactory, and almost always founded upon reason.

Another quality which Judge Johnson had, was that of industry and punctuality. He was always present at the appointed time. I can scarcely recollect an instance when he failed in that respect, and we all know that, in his twenty-five years of service, he labored month after month, and year after year, almost without relaxation; and this arduous and continuous labor was probably one of the causes which has consigned him, perhaps even at his age, prematurely to the tomb. And yet, although Judge Johnson has been called from the bench a short time before the expiration of his term, he had arrived at that age when we could not much longer expect his services; and, after all, is it not as well that a man whose life has been such as his

has been, should be called away in the very midst of his labors, dying like a war-horse in the midst of battle? It is better that he should die thus, than that he should linger on useless, that it may be said of him that, during his whole life, from early manhood to ripe old age, he was useful in his day and generation. He was like a sheaf of corn fully ripe; he has been gathered by the Eternal Reaper. May he rest in peace.

The committee upon resolutions presented the following, which were read by their chairman, Judge Rawson :

The members of the Bar of Monroe county have received with great sorrow the intelligence of the decease of Hon Thomas A. Johnson, which occurred at his residence in Corning, on the 5th of December, instant, and have met to give some expression of their high appreciation of the character of the deceased, and their sense of loss as members of the legal profession and as individuals. Therefore, it is

*Resolved*, That in the death of Judge Johnson the Judiciary and Bar of this State have lost an eminent jurist, whose great legal attainments, sound judgment, clear and strong intellect, quick moral perceptions and generous sympathies peculiarly fitted him to discharge the important duties of the high judicial office he has so long filled with such distinguished honor.

*Resolved*, That his untiring devotion to official duties through a long judicial career, his great purity of character and unbending integrity, always commanded our confidence, respect and admiration, and we commend his example as worthy of imitation.

*Resolved*, That in private and social, no less than in public life, his plain and simple manners, his unpretending modesty, his genial disposition and great kindness of heart, won for him the regard and love of all those who were honored with his friendship.

*Resolved*, That while we feel deeply the great loss sustained by the judiciary and the profession, and the loss which the community has sustained in the departure of one possessing all the elements of true Christian manhood, we can but express that deeper sense of loss felt by us in the removal of a dear friend whom we loved, and in whose wise counsel we have so long confided.

*Resolved*, That we tender to the family and friends of the

deceased, as mourners with them, our warmest sympathy, in their great bereavement.

*Resolved*, That a copy of these resolutions be signed by the president and secretary, and transmitted to the family of the deceased.

*Resolved*, That a committee of three members of the Bar be appointed by the president to present these resolutions at the next session of the General Term of the Supreme Court for the Fourth Department, and to ask that they be entered upon the minutes of that court.

J. D. HUSBANDS, Esq., said :

*Mr. Chairman.*—By the death of Hon. Thomas A. Johnson, a justice of the Supreme Court of New York for the Seventh Judicial District, the Bar of Monroe county has sustained a loss which its members keenly feel and mourn as a personal as well as a professional bereavement. Elected immediately after the adoption of the Constitution of 1847, he continued on the bench by successive elections, during the remainder of his life, and survived all his cotemporaries as a justice of the Supreme Court. Judge Marvin ceased to be a justice of the Supreme Court in June last, and Judge Johnson was the last of that noble army of judicial men remaining upon the bench. The record of his judicial life for a quarter of a century in eventful times, and in educated commercial and agricultural communities, has become the valuable and valued property not only of the citizens of this State, but of this country and of England and elsewhere, where the reports of our Supreme Court and of the court of *dernier resort* are cited by the Bar and accepted by the bench as high authority.

To the judicial learning of our times Judge Johnson has contributed his full share. His opinions indicate broad and comprehensive views of popular government, a love of virtue for its own sake, a detestation of vice in all its forms; sound scholarly culture; great industry and research; a judgment calm and nicely balanced, and an inflexible desire to do equal and exact justice with rigid impartiality. They also indicate logical deduction and arrangement, acute analysis and intellectual penetration, which enabled him with his sturdy and manly common sense to search out the right and vindicate the truth. A pure, noble, intellectual and cultivated judge has fallen, sur-



rounded by multitudes who loved and honored him in life, and who venerate his memory as a bright and shining example to those who survive.

To our Bar Judge Johnson was more than the judicial officer. We mourn him as a devoted, large-hearted, genial, personal friend. Always dignified, he was never austere. On the bench he maintained to us and to all men, the dignity and proprieties of the judicial station. Relieved from the bench, he was our companion, enjoying friends and friendships and social life with a zest inspired by a generous heart, full of kindest impulses. He loved and was loved. A commanding personal presence, combined with mental culture and fine literary tastes, made him the accomplished gentleman. His uniform spotless Christian life gave beauty and tenderness to his social relations. His personal habits were singularly methodical, and were under the direction of life-long principles directing his daily conduct. In the tenderness of domestic refinement, Judge Johnson shone with a luster all his own. This sacred temple gladdened so long by the sunshine of his presence—now so darkened—we approach with reverent steps, and pause at its threshold to weep with its inmates, mourning their dead and also our dead. This whole Bar, I know, tenders to those within sincere condolence in their great bereavement.

I was struck with a remark, when I came in, that my brother Cochrane was making, in regard to the peculiar qualities of Judge Johnson. One was his patience. He had what the Romans used to call "*mens sana in corpore sano*;" and there he sat, day after day, week after week, month after month, performing the labors and duties which usually cause so much strain upon the system. Another qualification was, he was willing to be convinced. I remember, once, with all the positive qualities of his peculiar mind—and strong in these qualities he was—upon the instant he formed his first impressions strong and clear, and upon the occasion to which I allude, the counsel stated to him that there might be a question, on a certain point, which he had overlooked. He settled back in his chair and said: "It never did hurt me to hear an argument, and I will hear what you have to say." After listening to the remarks and suggestions of counsel, he promptly, with that manly vigor of intellect which always characterized him, decided directly against his first convictions in the case. His heart had no taint

of impurity upon it. He had what I call *mental integrity*. Give him a proposition, so that he had his premises, and with his clear method of reasoning he would almost inevitably arrive at a correct conclusion. His was honest mental logic. He had no desire but to hold with untremulous hands the scales of justice, so that no man should be deprived of a right, and no man protected in a wrong. He stood among his brethren the stalwart, fearless, mighty judge—not, perhaps, the greatest among the great, but great among the greatest. He was, every inch and every fiber, a man; and when you say that, you have included all that God made of man. God had given him peculiar qualities to adorn the bench and to dignify it, by magnetic power to win men to him, and to command their respect, for all who came before him saw that he was honest, upright, able, ever dignified, striving to discharge his duties.

Such was Judge Johnson. We cannot pronounce his eulogy here to-day. It is natural that upon such a solemn occasion as the present the sadness of our hearts should in a measure seal our lips from the utterance of a fitting tribute, but his memory will ever be cherished by all those who have had the pleasure of knowing and loving, of honoring and reverencing our departed friend and brother.

GEORGE F. DANFORTH, Esq., said :

*Mr. Chairman.*—I should be very sorry, even at this hour, after so much has been so well said and so sufficiently expressed in the resolutions that have been read, to have the meeting pass without paying the tribute I entertain for the memory of Judge Johnson. To have been a member of the Bar during the entire period in which Judge Johnson sat upon the bench, to have had occasion, with greater or less industry, to examine and study the opinions which he pronounced, from the first volume of the reports under the new Constitution to the last, to have seen pass away from our presence first one and then another of the judges who, with him, entered upon the judicial career, has made an impression upon my mind which never can be effaced. Not many here, but some, will call to mind that, in this district, the bench was first illustrated and adorned under the Constitution of 1846, by Johnson, Selden, Maynard and Welles. We recollect that Judge Maynard died first, and after many years passed from us Judge Welles. One only survives of the four;

Judge Selden, not occupying an official position at present, but having adorned not only the bench of the Supreme Court, but of the Court of Appeals. With the exception of Judge Johnson, up to the time of his death, no member of the original judicial force of this district remained in activity. The record of Judge Johnson's life will be found, not in any eulogy we may utter, not in any expression of esteem which may be heard in this district or department, but will be found in the sixty-two volumes of Barbour's Reports, with here and there an opinion in the New York Reports. With an industry which knew no abatement, Judge Johnson received, examined and disposed of every case which came into his hands, down to and including the last term of court at which he was present, held in this room. A similar record for a similar length of time, I presume, cannot be presented in the life of any judge.

We here feel his loss, not only as a professional, but as a personal friend. The gentleman who preceded me has referred to the band of judges who went on the bench in 1846. I have no doubt that their labors will compare favorably with those of any other judges who have ever lived in this or any country, for the same period of time, or the same number of volumes; and yet many will remember with what doubt the system of our elective judiciary was adopted. We certainly, in these considerations, may find great cause for hope that in the continuance of the system we may seek other men equally entitled to the honor which we have been called upon, from time to time, to show to those whom we have already known.

That a judge was honest, and that he proceeded on his way faithfully and laboriously, we should be able to say of every judge; but that, in addition to all this, Judge Johnson should leave the feeling which is entertained by the Bar, is, I think, unprecedented. I have no doubt that the most sincere emotions of the heart are expressed in the addresses and resolutions which we have heard. For myself, I feel the loss of Judge Johnson deeply. That we may have as great judges, I trust we may believe; but it is not likely that, to the older portion of this Bar, another can come who will take the place in our affections which was occupied by Judge Johnson.

LYSANDER FARRAR, Esq., said :

I concur fully in the sentiments expressed in the resolutions, and in those expressed by each of the speakers who have preceded me. I was at the Bar, a young man, when Judge Johnson was first elected to the bench, and have known him, more or less intimately, during all that period. He was certainly a very remarkable judge. He was distinguished for all the great qualities which have been ascribed to him by the resolutions and by the speakers ; but I think he was especially remarkable for the two qualities that have been adverted to—patience and integrity. His patience in hearing arguments, and in the trial of causes, was very remarkable. I never knew an instance when he showed any impatience, and there is no position, perhaps, in which a man can be placed which subjects that quality to a more severe test than that of a judge attending the trial of causes. There is scarcely any eminent judge whose character has gone into history, who has not sometimes been liable to criticism, and whose conduct has not been justly criticised for its want of that particular quality, but I never heard of a criticism being made by any lawyer, or by any other person, upon Judge Johnson. Every member of the Bar who submitted the argument of a case to Judge Johnson was certain of two things—that it would be patiently and thoroughly investigated, and that the determination, whatever it might be, would be honest and fair. There have been other judges, perhaps, more eminent, in an intellectual point of view, than he ; but in these other qualities to which I have adverted, which are of the highest importance, no other judge in this State, or in this country, ever surpassed him.

D. C. HYDE, Esq., said :

*Mr. Chairman.*—As a junior member of this Bar, I am unwilling that the remains of this great man, which lie cold in a distant county, shall be committed to the grave without an expression of the debt which I owe to him as one of the judiciary of this State. He was one of the first judges before whom I had the honor of practicing. The young men of this, and of every county in the district, are indebted to him for the kindness which he always extended to them. It seemed to me that he was unwilling that a cause should suffer because of the inability of the young man who had it in charge, and it was not

an infrequent thing for him to suggest how a difficulty might be avoided. It is not every good judge, as every young lawyer well knows, who, whether he considers it his duty or not, will condescend to do that ; and it seems to me that, when such a characteristic as that is manifested in a judge, the younger members of the Bar should recognize its value. I am unable, and I should not regard it necessary, to undertake to say anything with reference to the character and the judicial ability of Judge Johnson. It is enough for me to say that I knew the man, and I desire to express my thanks for the kindness which he always exhibited to me while I was practicing in his courts; and I believe there is no danger in the elective system, as long as such men fill the bench, nor is there much danger to republican institutions while such men as he have the interpretation of the laws.

HON. E. DARWIN SMITH, said :

I approve of these resolutions, and concur most heartily in all that has been said in them, and in the remarks of those gentlemen who have spoken in respect to Judge Johnson, his merits, his works, and his judicial character. They do him no more than justice, and so far as they express the feelings of the Bar, they are just and proper. But I feel a personal loss and bereavement in his death which cannot be felt, in the same degree, at least, by the other members of the Bar. He was my associate and friend for many years upon the bench—one who stood to me as a brother ; and his death comes very near to me. For seventeen years we have sat together in the courts, and have gone in and out together. We have sat, if not around the same council fires, around the same social and judicial boards in consultations and discussions in respect to questions of law affecting the lives, liberty and property of our fellow-citizens. Our relations have always been most intimate, most kind, and most cordial, when we differed in opinion, as well as with my late brother Welles, who has gone before him. And I will say the same of all my brethren on the bench of this district. Though we have differed on questions of law, we never had differences that went out of the council chamber, and there was never any asperity or unpleasantness in any of our relations. Our discussions were always in kindness, and never did a discussion amongst us leave any feeling behind it, and scarcely a dissent. Judge Johnson

was only intent that right and justice should prevail, and was ever open to conviction, ready to listen to the arguments of his associates, and to yield to their views when he thought they were right. He was not tenacious, although a decided man. In all these things I considered Judge Johnson a remarkable man ; and it is, perhaps, attributable to him and to our venerable father who went before him, that our relations were so pleasant.

Judge Johnson was ever particularly friendly to Rochester and to the Rochester Bar. He frequently said to me that Rochester was one of his homes, and that he always felt that here he was at home and among his friends. He was particularly observant of the kindly manners and gentlemanly deportment and courtesy of the members of the Bar of this county among themselves, frequently mentioning it as a subject of gratification. I remember particularly his allusion to this subject some years ago, when on the occasion of the decease of the late William S. Bishop it fell to my lot, as Presiding Judge of the General Term, to respond to some resolutions and remarks addressed to the court in respect to his memory, and to speak of his gentlemanly manner and his efforts to influence and promote kindness and courtesy and good feeling among the Bar. Judge Johnson said to me that he had always observed with pleasure the gentlemanly deportment exhibited by the members of our Bar toward each other, and that he never had had an occasion to rebuke any of them.

The feelings which the Bar express I entertain most fully, and I have no doubt that the bench and Bar throughout this department and throughout the State feel that they have sustained a great loss in the decease of Judge Johnson. The resolutions presented and the addresses to which we have listened, all testify that the Bar of this county fully appreciate their loss.

The resolutions were unanimously adopted. Hon. Henry R. Selden, George F. Danforth and William F. Cogswell were appointed as a committee to present them to the General Term.

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At a meeting of the members of the Bar of Cayuga county, held at the Court-House in Auburn, on the 7th of December, 1872, David Wright, Esq., was appointed Chairman, and J. T. M. Davie Esq., Secretary.

The Committee on Resolutions, consisting of David Wright, John L. Parker, Charles F. Durston, James R. Cox, and Theo. M. Pomeroy, reported, through Mr. Pomeroy, the following resolutions, viz. :

*Whereas*, We have received with profound sensibility the sad intelligence of the death of the Honorable Thomas A. Johnson, a justice of the Supreme Court of this District, and have left to us, as our only consolation, the consideration that death is the inevitable portal by which alone man can enter upon the life eternal. It is by the Bar of Cayuga county, in memory of one so cherished by them all,

*Resolved*, That while we are not advised of the history of the closing hours of our departed friend, we nevertheless know from his exemplary Christian life, that he died realizing the highest aspiration of dissolving humanity, that "He died the death of the righteous, and his last end was like his."

*Resolved*, That in paying this last sad and unsatisfying tribute to the memory of one who for more than a quarter of a century has walked with us in private life as a beloved friend and associate, and, in his public career, has exhibited before us at all times an unsurpassed purity and ability of judicial administration, we deeply realize the overwhelming loss of an eminent jurist and Christian gentleman.

*Resolved*, That we shall ever take a just and honorable pride in the memory of Justice Johnson. He was placed in his high position, at the first election of judges, under the Constitution of 1847; and died, the last in official life of the long list of eminent lawyers who were elevated to the bench with him. Learning, dignity, purity, courtesy distinguished his entire official career, and at all times justified the wisdom of our choice. His purity of private life, geniality in social intercourse, great legal attainments, patience in the administration of justice, unbiased judgment, and incorruptible integrity were so fully and completely blended as to illustrate our ideal of an upright judge, whose large place in the jurisprudence of our State we know not how to supply.

*Resolved*, That in the earnest, pure and laborious life of Justice Johnson, the Bar of this county have an example worthy their highest reverence and emulation; and that to improve the lesson he has taught, we will endeavor to advance the standard of professional learning, courtesy and integrity.

*Resolved*, That while we mourn, for ourselves and for the stricken family, the departure of the beloved husband, father and friend, we rejoice in the example of such a life and recognize the fact that for him "death has no sting, the grave no victory." He has gone in the fullness of years, with a great and laborious work accomplished, to his reward. We trust that the contemplation of such a life may teach the value of those treasures of time which are imperishable, and of those virtues, which, planted here, become immortal with us.

*Resolved*, That these resolutions be published in our city and county papers, and that a copy be transmitted to the family of the deceased, in the hope that there may be found therein assurance of our deep sympathy with them, and of our honor and respect for the departed.

*Resolved*, That a copy of these resolutions be presented by the Chairman of this meeting to the Supreme Court at the next circuit, held in the county of Cayuga, and that he move that the same be entered in the minutes of the Court.

In presenting these resolutions, Mr. POMEROY said:

I move the adoption of these resolutions. I can only hope that they may, in some feeble way, express the real sentiments of the profession of this county. I know it is hardly proper for me to take up much time in a meeting like this, estranged as I am in my daily walks from the profession in which I once practiced so long. And yet I feel, on occasions like this, when, one after another, those before whom and with whom I have practiced are laid away in the grave, I have a right to renew my brotherhood with you; and when my time shall come, and I shall be called away, I hope that the feeling of my brotherhood will remain behind with you.

Of all the men, Mr. Chairman, with whom I have ever been associated in my life, I have never met with one in whom the Christian graces were so rounded out and completed as in Justice Johnson. It seems eulogy to speak the truth of him. In him, the Christian graces were combined to a degree I never saw surpassed. He pre-eminently added to faith virtue, and to virtue knowledge, and to knowledge patience, and to patience temperance, and so on through all the graces to charity, which crowned them all. He was always dignified, and yet never severe. A pure Christian, and yet never ascetic. He fought



not with the common weaknesses of the world, but he dealt with those vices which all men are expected to eliminate from their characters and lives. I doubt if there be one, who has grown up under the judicial administration of Justice Johnson in this district, who cannot bear testimony from his own personal experience to this, and particularly to the eminent kindness he manifested to young men rising up in the practice of the profession.

He was courteous to all, to old and young, learned and unlearned. He had a word of encouragement for all. I can bear my testimony, because I shall never forget, as long as I have memory, the feelings he inspired in me at the first trial I ever managed in his court. It was at the trial of John Baham, a protracted and lengthy suit, at which I felt my whole future was at stake. If I managed that case well, I knew I had grounded myself in the profession. If I failed, then the predictions of those who, months before, had pronounced me incompetent to hold the office of District Attorney, by reason of youth and inexperience, would be verified. When the jury left their seats and retired to their room, in the midst of an intense stillness in the court room, Judge Johnson motioned me to the stand, and he whispered in my ear words of encouragement such as I can never forget. By that I was stimulated to further zeal in the profession. I felt a gratitude to the man which has but grown and been strengthened by the kindness of later years.

Justice Johnson combined so many excellencies, I repeat, that it seems almost eulogy to speak the truth. We ought not only to remember him but to study him. For thirty years, in the political world, our eyes had been tending, in peace and in war, toward the one great arch enemy of American unity and American growth, the system of American slavery. We followed it through peace; we followed it through war, till at last it fell, and fell forever from American history. But while we were engaged in fighting the great arch enemy of our country, another, subtler and equally dangerous, had grown up, beginning in the lower walks of political life, reaching into our legislative halls, and spreading till its slime reached even the ermine on the judicial bench. I know what I say, for I have seen it. I have been in it; I know it. That corruption of the judiciary of the city of New York, which required the strong arm of impeachment to remove, had its origin in the Bar. Those

orders, injunctions and judgments, which have been the stench of our judiciary system for the last few years, were covered by the mantle of lawyers, eminent to-day in the profession, who would be shocked if their integrity should be questioned. They have been misled by the Bar, and I say that purity of the bench is to be first found in the purity of the Bar. Through all this period Justice Johnson sat on the bench, and I do not believe that the man lives who ever spoke of him as, in thought, word or deed, biased in judgment by personal favor or any consideration unworthy of his position.

Now, I hope, that, as far as the limited sphere of our usefulness goes, the life and death of a man like Justice Johnson may not be lost upon us, and that, as is said in one of these resolutions, in the lessons of his life we may learn to strive for a higher standard of moral excellence in ourselves. With these remarks, I again move the adoption of the resolutions.

JAMES R. COX, Esq., spoke to the resolutions as follows:

*Mr. Chairman.*—I cannot help saying a few words on this occasion, in view of that which is forever past and irretrievably gone from our profession. Our dependence upon Justice Johnson, as a valuable judicial officer, was very great. He never disappointed us on a single occasion, when a term of court was appointed to be held here. We were never disappointed when we asked for a fair, impartial trial in any case before him. It seems to me that, deduct Justice Johnson from our district, and it almost makes one willing, as brother Allen and brother Pomeroy have done, to quit the profession.

The experiment of an elective judiciary is not yet wrought out in this district. In the particular instance of Thomas A. Johnson, the choice fell on a fortunate selection. But somebody has said that in an absolute monarchy, he who is truly a father to his subjects is one of the greatest enemies to mankind. For that is made popular by an excellent selection which is abused by tyrants. Justice Johnson was always kind, warm hearted, considerate, patient, forgiving. The Christian graces shone in all his deportment. He was not a man favored by fortune. His early days were spent as were the days of our late lamented chief magistrate. He swung the axe for his living. With difficulty he acquired the elements of a knowledge of the law. He commenced practice under unfavorable circumstances. He had

very little intercourse with refined society in his early years, and we could all see the restraint and lack of freedom engendered by that misfortune. But over those obstacles he triumphed, and he became as fine a specimen of the candid, Christian gentlemen as I ever saw. I hazard nothing in saying that, of all others, he was the model and favorite judge of western New York. And I am doing no injustice, in so saying, to the many distinguished men who fill places on the bench in this part of the State. They all will unite in saying as I do.

He was most considerate to young men. I may be pardoned in stating my own experiences, as brother Pomeroy has done. I wanted to get a writ of certiorari. I was a beginner in the law and had a highway case. I was told I must get the writ at court, which was then being held at Lyons. I went there. I was not acquainted with Justice Johnson. I approached him with awe. After dinner, I took advantage of his being in his room. I went to his room, and tapped at the door. I was admitted and asked if I could have his attention for a moment. Oh, yes, he said. I told him in an awkward way that I wanted a writ of certiorari, supposing he would sign it right there. He told me he never granted common law certiorari sitting in Chambers. I must make my application in open court. He talked pleasantly, looked into my papers, and told me to come into court after dinner and make my application, and state what I wanted. I was encouraged by his patient and pleasant manner. I went into court and felt as if I was addressing a friend. From that day to this, Justice Johnson has always been to me equally as kind and patient, and, on one occasion, he was required to exercise on my account the Christian virtue of forgiveness. We do well to remember his virtues. We can learn of him. Who ever heard him speak harshly from the bench? Who ever knew him to take advantage of his position to fling a cutting repatee at a member of the profession?

He ever discharged his duty with a profound sense of responsibility. I sat here as John Baham rose, in obedience to the order of the court, to receive his sentence. I shall never forget the faltering accents with which he pronounced that sentence. He seemed much more affected than the prisoner. (Mr. Allen—"He dropped his head down and cried after it.") He had a world of sympathy and ever sought the advantage of mankind. In respect to the temperance question, he went further than

most of us thought wise in our day. But he erred always on virtue's side. I think I cannot point to any member of the Bar in my acquaintance, who, having passed away, presents so spotless a record or so noble and useful a life as Thomas A. Johnson.

WM. ALLEN, Esq., said:

It was my intention, Mr. Chairman, to have said more than I shall now do, because the resolutions so fully express the sentiments I had intended to express. There is but little left for me to say. The eloquent language of the gentlemen who have preceded me fully express my sentiments.

Judge Johnson came upon the bench of the Supreme Court the first year after my admission, so that my whole professional life was associated with him. He always showed great kindness and consideration to the members of the Bar, and especially to the younger members of the Bar. He was patient and learned. He was my ideal of a lawyer and a Christian gentleman. He was affectionate. He was strongly domestic in his feelings. In other years, when I was in active practice, Judge Johnson seldom held a term of court here without spending an evening or more at my house. I saw much of him socially. It was his sociability and courtesy that endeared him to all. In the language of one of the resolutions, the example of such a life should elevate us as lawyers—should elevate us as men and as citizens. Such a career is open to every young man entering the profession. Is it fully appreciated? Is the feeling that, to become a lawyer, one becomes a member of a learned profession, with opportunity for the highest culture and the best association, fully appreciated by the present generation of younger lawyers? It does not seem to me that there is an elevated *esprit du corps*.

The cultivated Christian lawyer is the highest type of manhood. It should make the courteous gentleman. It seems to me that these are the lessons which the life of Judge Johnson has taught us. I trust it may make such impressions upon all of us.

As I look back and recall some of the wrangles at the Bar which I have witnessed, they seem altogether unbecoming before such a man. It should have rebuked them into silence and self-respect.

Like Mr. Pomeroy, though not in practice, I am still a lawyer and have a strong feeling of brotherhood with the Bar.

I know of no higher ambition than to be a respectable and respected lawyer. And I am largely indebted to Judge Johnson for the development of this feeling.

WARREN T. WORDEN, Esq., said :

Scarcely anything farther can be said of Judge Johnson than has already been said. I have, on several occasions, noticed the exhibitions of his kindness, but on no occasion, I think, did it strike me more forcibly than on presenting to him the resolutions of the Bar on the death of George Rathbun. He not only showed his feelings, but expressed them. He related the reminiscence, at that time, that when he first came to Auburn, and held his first term of Court here, the first cause was tried by Mr. Rathbun.

One thing in Judge Johnson's life, perhaps, is worthy of mention. In all his judicial career he never held a term of court in the city of New York. He had a dislike for going there, which he expressed. He often spoke about the extra fee allowed to justices who went to the city of New York. He did not see how it could be paid, under the Constitution. His salary was fixed at so much. The extra allowance was \$10 a day. He never went and never took the extra allowance.

DAVID WRIGHT, Esq., said :

I can most conscientiously indorse all that has been said in regard to Judge Johnson. I knew him probably earlier than any person here. We were admitted in the same class, in 1832. I knew him very well after that time. As early as 1843, and before he became a judge in the Supreme Court here, I had occasion to be with him in Corning professionally. I was well acquainted with him to the time of his death. I have never known him to fail to attend a circuit when assigned to him. When a Circuit or General Term was assigned to him he was always there. He did his duty faithfully, and even the duty of other judges. As Mr. Worden remarked, he never went to New York. When others went to New York, he took their places here. I never heard any lawyer express regret that Judge Johnson was going to hold circuit here. So far as I have heard, it has been the universal wish of the Bar that Judge Johnson *might* be on hand when assigned to the circuit. All

had entire confidence in him. Of course, we knew he was liable to err, for he was mortal; but we were always sure of a fair hearing, a due consideration and just judgment, as he understood the case. And he was generally right. I doubt if any judge ever sat on the bench of the Supreme Court whose judgments and decisions were less seldom reversed than his. He did as much to establish the law on a sound, just, equitable basis as any man living in the State of New York. We have always been particularly fortunate, in this district, in the election of judges, and if you young gentlemen here are as fortunate in this respect as we of the elder branch, you will be fortunate indeed. It will not be long, perhaps, before all the old standbys of this Bar will pass away. We cannot all hope to leave so bright a record as Judge Johnson, but we hope that the younger members of the Bar will benefit by his example and forgive the imperfections in ours.

The resolutions were then unanimously adopted, and the meeting adjourned.

# In Memoriam.

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## PROCEEDINGS

OF THE

MEETING OF THE NEW YORK BAR, ON THE DEATH

OF

MARSHALL S. BIDWELL, Esq.,

NOVEMBER 2, 1872.

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On the second of November, 1872, in pursuance of public notice, a large number of the members of the New York Bar assembled in the County Court-House, in the City of New York, to take proceedings in relation to the death of the late MARSHALL S. BIDWELL.

The Meeting was called to order by HENRY NICOLL, Esq., on whose motion Judge DANIEL P. INGRAHAM was called to the Chair.

On motion of EDGAR S. VAN WINKLE, Esq., JOHN P. CROSBY, Esq., was elected Secretary of the meeting.

Mr. HENRY NICOLL addressed the meeting as follows:

*Mr. Chairman.*—I have been instructed to offer the following resolutions, as expressive of the sense of this meeting of the Bar, at the death of our associate, Mr. Bidwell:

*Resolved,* That the Bar of the City of New York is deeply sensible of the loss it has sustained in the death of Marshall S.

Bidwell. Suddenly called from the midst of us in the full possession of his matured intellect, and after a long career of distinguished usefulness in his profession, he will be remembered by his brethren as an able and learned lawyer, a courteous gentleman, and an earnest Christian.

*Resolved,* That we tender to the family of the deceased the expression of our sincere condolence in this afflicting event, and that a copy of these resolutions, attested by the Chairman and Secretary, be forwarded to them.

*Resolved,* That a Committee of three members of the Bar, to be appointed by the Chair, be directed to present these resolutions to the Court of Appeals and to the General Term of the Supreme Court, and respectfully ask that they may be entered on the minutes of those Courts.

Probably the duty better devolves upon those who were more intimate with Mr. Bidwell than myself, of speaking of the character and distinguished position which that gentleman enjoyed at this Bar. I have known him through a long career, and I presume I simply speak the sentiments of every one here, when I say that a more learned lawyer never practiced in our Courts. He was especially distinguished, as we all know, in those higher branches of the law which relate to real estate. And no lawyer in this country had made himself more thoroughly a master of the recondite principles of that law than Mr. Bidwell.

I remember well being present when he was sworn in as a Counsellor of the Supreme Court of this State, in January, 1838. The country at that time was in a very excited state, owing to the burning, by the Canadians, of the Steamer Caroline, on the Niagara River. News of this startling event had just arrived in the City of Albany, and it was universally believed that it would lead to war with Great Britain. Mr. Bidwell was erroneously supposed to have compromised himself in the Liberal movement in Canada, and in consequence received notice from the Government authorities to quit the country immediately. He arrived in Albany when the public mind was greatly agitated on the subject, and the appearance of so distinguished a man, exiled and driven from his home for such a cause, added not a little to the excitement.

I well remember the interest that was felt when Mr. Bidwell came into the Court, and, in the presence of a large assembly



was sworn in as one of its Attorneys and Counsellors of this State. He was most cordially received by his brethren, and, bearing as he did a high reputation, which he had acquired by an active professional life in Canada, the addition of such a person to our Bar was hailed with great satisfaction. From that time to this, a period of nearly forty years, Mr. Bidwell has lived in this City, quietly following his profession, and has earned for himself the character depicted in these resolutions. I ask their adoption.

Mr. BENJAMIN D. SILLIMAN said:

*Mr. Chairman.*—The resolutions which have been read, and which I beg leave to second, describe justly the character and the virtues of the great lawyer, and the good man, who has passed away. The venerable, and honored, and beloved senior of this Bar has finished his long career of labor and of usefulness. He was indeed a most learned and able lawyer,—a dignified, refined and accomplished gentleman,—a warm and faithful friend,—a pure, generous and noble man. These expressions are strong, but I am sure that they are sanctioned no less by the judgment, than by the heart, of every member of this meeting.

Mr. Bidwell was born in Stockbridge, Mass., in February, 1799. When he was thirteen years of age the family removed to Bath, and thence to Kingston, in Upper Canada. His education, and his admission to the Bar, in April, 1821, were in that province. He quickly rose to eminence, and was, at an early period of his life, among the very foremost members of the Canadian Bar.

In 1824 (at twenty-five years of age), he was elected to the Provincial Parliament, of which he continued to be a member for eleven successive years. He was elected Speaker at the sessions of 1829, 1830, 1835 and 1836. He was the acknowledged leader in that body of the "Liberal," or "Reform" party, which corresponded substantially in principle with the "Whig" party of England. Opposed to this organization was the "Conservative" party, nearly identical with the "Tory" party of England, though, perhaps, more ultra than the latter in its convictions, and disposed to go farther in enforcing them. There was, at the same time, in Canada, a third party of Ultra Radicals, headed by William Lyon McKenzie, which aimed at

revolutionary measures, and sought to detach the Colony, by violence, from the British Crown. In the opinions and plans of this party Mr. Bidwell did not concur. He, and those with whom he acted, proposed to accomplish the reforms for which they contended, only by peaceful and legal means.

About this period, Sir Francis Bond Head became the Governor of Upper Canada. He was an extreme Tory, intolerant and bitter toward those who differed from his political creed,—impetuous, arrogant, and prompt in exercising the power with which he was vested. Mr. Bidwell was in quick antagonism to such a ruler, and was an opponent of whom Sir Francis earnestly desired to be rid, because his ability, his purity of character, and his singleness of purpose, gave great strength to the Reform party, of which he was justly regarded by the Government as the controlling and formidable leader.

But the Governor was specially embarrassed, at the same time, by receiving from the Home Government, (of which Lord Melbourne was then the head,) a commission appointing, or directions to appoint, Mr. Bidwell to the office of Chief Justice of the Court of Queen's Bench. The Governor thus thwarted, it is believed, addressed a remonstrance to the Foreign office against the appointment, but without effect.

Meantime, however, he found relief in an untoward event. The Radical, or revolutionary, party commenced the armed and disastrous insurrection of December, 1837. It was quickly suppressed, and the insurgents dispersed. But among the banners captured from them was one bearing the inscription, "Bidwell and the glorious minority." This was, in fact, an old political banner, which had been used on an earlier occasion, and had been appropriated by the insurgents, whose hasty preparation, and scanty means, compelled them to adopt and use imperfect ensigns, as well as arms.

I need not say to this audience that nothing could be less compatible with Mr. Bidwell's peaceful and law-loving nature, than violent and insurrectionary measures. His reverence for law and order was part of his very being, and nothing could be more certain than his non-concurrence in the course of the revolutionary party, even had its movement been less desperate, and certain of failure, than it was.

But this occurrence gave to Sir Francis Head the opportunity he desired. He notified Mr. Bidwell of the capture of the flag;

intimated the existence of letters, and other evidence, implicating him with the rebellion, and rendering him liable to prosecution for High Treason. He further stated to Mr. Bidwell that martial law was about to be declared, and that he could not protect him from arrest; but informed him that in consideration of his unblemished private character, and high professional standing, he would not be disturbed, if he saw fit to depart from Canada. Mr. Bidwell, perfectly conscious of his own absolute innocence of participation in the plans and actions of the insurgents, at the same time knew that the country was wild with wrath and excitement,—that the exasperated “Conservatives” (or “Tories”) were at such a time likely to rush to quick judgments, and that he was especially obnoxious to them as the most prominent, and the ablest, of their constitutional adversaries.

Under these circumstances, he foresaw nothing but personal embarrassment, and the total interruption, perhaps for an indefinite and ruinous period, of his peaceful and professional pursuits. He therefore accepted the Governor's proposition, and left Canada for New York.

I trust, Mr. Chairman, that my learned friend, Judge Neilson, of Brooklyn, who is now present, and much of whose youth was passed in Canada, will add to the slight and very general sketch which I have given of Mr. Bidwell's career before he came among us, with the particulars of which Judge Neilson is familiar.

When Mr. Bidwell came to this State, the Chief Justice of our Supreme Court was the Hon. Samuel Nelson, now and since 1845 one of the Justices of the Supreme Court of the United States, and who is still spared to us. “By reason of strength he has come to four score years,” yet his “eye is not dim nor his natural force abated.” The reverence and affection in which he is held by the profession and by the country, are the fit reward of the life he has led. At the head of our Equity Courts was *Wahoorth, clarum et venerabile nomen*, the last of the Chancellors. To the Courts over which these eminent jurists presided Mr. Bidwell was welcomed, and he was admitted to them by special orders.

Among the many who extended to him a cordial reception was the very distinguished lawyer, George Wood, by whom he was introduced to the late George W. Strong, Esq., one of the

most trusted and able Counsellors of that day, with whom he formed a professional alliance, which continued until Mr. Strong's death, in 1855, and which was maintained with the surviving members of that firm, George T. Strong, Charles E. Strong and Elias G. Drake, Jr., Esquires, until his own departure from the world.

Although the outbreak in Canada, to which I have referred, was crushed, yet the Government ere long conceded what the popular voice had demanded, and those who had so long struggled for that great result were thenceforth placed in power.

Mr. Bidwell's return to Canada was earnestly desired by its best and most prominent citizens, and he received assurances of the welcome and preferment which awaited his coming. But he had already found abundant professional occupation and social sympathies in our great City and State, where he determined to remain, though his interest in the home and friends of his earlier life never failed, and his friendships and intercourse with them continued to the end.

The thirty-four years of his residence here have been a period of unbroken, active, distinguished professional labor and usefulness, and, at the same time, of devoted service in the great religious and charitable institutions with which he was connected,—prominent among which were the American Bible Society, of which he was a Director, and the Bank for Savings, in the City of New York, of which he was the President.

The first case of importance in the Courts in which he was concerned, after his arrival in New York, was that of *James Fenimore Cooper vs. William L. Stone*, for libel, founded on criticisms by defendant on certain literary labors of the plaintiff. Mr. Bidwell conducted the defence with ability so distinguished as to place him, at once, in the front rank of the New York Bar. From that time forward he was engaged in very many most important cases, in the local Courts, and in the Court of Errors, and the Court of Appeals, and in the Supreme Court of the United States. Those cases are so numerous, and are so familiar in the reports, as to render particular reference to them here unnecessary.

He was profoundly learned in the Law. Chancellor Walworth said of him, what can be said of few in these days of Codes and Digests, that he was "a great lawyer." He had gone back to the sources and fountains, and studied and mas

tered the principles and the rules of law, that had become established. He knew not only what they were, but he knew their origin, their history, and the cases in which they had become shaped, modified and determined. Nothing more delighted him than such studies. He has often said that he found far more entertainment in tracing some legal principle back through the Reports of the seventeenth century, than in perusing the most attractive work of fiction ever written. Not only the provisions of the leading statutes, but their political and legal history, were entirely familiar to him.

Though he was thoroughly acquainted with every branch of his profession, including constitutional, commercial and equity law, yet he had, perhaps, given the most attention to the law of real estate,—of trusts,—and of the construction of wills,—and felt himself most fully at home in their discussion. His name is identified with the leading cases of this character in our Courts, during his time, in the learned arguments of which he bore a distinguished part.

His "Points" and "Briefs" were models of compact, clear and close reasoning, and were enriched by full citations of sustaining authorities and decisions. He was not a "Case Lawyer." He argued every question on principle. He was a legal philosopher and reasoner. He was so familiar with the principles that when a case was stated to him, he rarely hesitated in pronouncing the law that governed it, and his knowledge of the leading decisions was so ample that he was always prepared to marshal them to his support.

He loved the law, and he practiced it not for lucre, or even for fame, but as a science of which he was an ardent votary. He regarded its majesty, and sovereignty, and certainty, with reverence. Such was his sense of the duty of administering it in its exact integrity that, had he been on the Bench, he would have made little of that "bad law" which is said to spring from "hard cases," for he could no more pervert, or warp, or misrepresent the law than a mathematician could pervert, or warp, or misrepresent a mathematical demonstration. When on an argument he cited, and stated an authority, the Court had no occasion to examine as to the correctness of its presentation. He was wholly incapable of giving any coloring to a decision which he cited, other than that which it properly bore.

He was a wise and sagacious Counsellor. He possessed largely

the uncommon gift of strong "common sense." He had great vigor and clearness of mind, a strong sense of equity, and his whole life was marked by purity and truth, that knew no shadow of change.

A more generous and unselfish man I have not known. How many of my brethren about me can attest this truth? Who, that in cases of difficulty and doubt, has applied to him for friendly counsel, that did not find him not only ready but eager to pour out to them, unsparingly, the rich treasures of his knowledge and wisdom? I allude not to cases in which he was "retained," but to those where the brotherhood of the Bar entitles each to seek a brother's aid.

Mr. Bidwell's reading beyond his professional studies was very large and varied, and his conversation was illuminated and made charming by his familiarity with science and polite literature. I may mention, in corroboration of this estimate of his attainments, as well as of his professional position, that Yale College conferred on him the degree of Doctor of Laws in 1858.

He was distinguished for the dignity of his person, and his bearing, his manly modesty, his courtesy, and his never-failing kindness and benevolence to all, and the ardor and steadiness of his affection for his friends.

One of his professional associates assures me that, during a daily intercourse of thirty-four years, passed amid the trying cares and worry and annoyances of active practice, he never heard from Mr. Bidwell one syllable of petulance, impatience or irritability.

He had unfailing and unqualified faith in the Christian religion, the beauty and purity of which he illustrated by his daily life, and he was entirely happy in his reliance on the future which it held out to him.

It was his often expressed wish, and his often uttered prayer, that he might be spared an enfeebled condition of mind or body, and a lingering death. His wish and his prayer were granted. In the full possession of his high faculties, and in perfect health, at the close of a cheerful and varied conversation in his office with one of his associates, followed by a playful and kind remark to another person, he instantly, without a struggle or a sigh, ceased to breathe.

How sad that such a light must be extinguished—that the knowledge and the wisdom accumulated by the toil of more

than half a century, must, in the twinkling of an eye, be blotted from the world forever.

How sad that the fame, and even the memory, of the most illustrious of our profession are so brief, scarcely surviving their departure. Those who adorned the Bench are registered in the "Reports," but the very names of William Slosson, of Peter A. Jay, of Samuel A. Talcott, of George Griffin, of George W. Strong, of Seth P. Staples, of Henry R. Storrs, of David B. Ogden, of Daniel Cady, of Abraham Van Vechten, are unknown to many who have already become prominent at the Bar.

But, Mr. Chairman, what a space they filled! They were the giants of the law in your and my earlier day. Who more trusted or honored than they? To whom did men more resort for advice, and guidance, and protection? Whose wisdom and counsels were more sought and heeded?

In a brief space the same will be told of Jones, of Sanford, of Ogden Hoffman, of Butler, of William Kent, of Prescott Hall, of Wood, of Lord, of Noyes, and of Hill—"So soon passeth it away." But they are not wholly dead. Each of them might well have exclaimed, "*Non omnis moriar.*" They still live in "the gladsome light of Jurisprudence," which they have shed, far beyond the limit of their own footsteps, upon the path that we are following. They still live in the good influence of their lives and example, perpetuated in the profession, long after they have vanished from the stage, as the wave rolls on after the breath has ceased that gave it impulse.

None have led a purer or a better life, or left a better fame, or a higher example, or will thus live longer, than the wise, and learned, and good man who has now departed from us.

Professor THEODORE W. DWIGHT said:

*Mr. Chairman.*—It has been my good fortune to have been acquainted with Mr. Bidwell for about fifteen years. During that time I have had abundant opportunities to know his rare legal attainments and his excellent personal qualities. He was, in the strictest sense of the word, a learned lawyer. While his mind was stored with American and English precedents, he was able to apply them with sound judgment and with great force of argument. His legal training was of the time when the old Common Law practice was still in force, and he was a master of the intricacies of the science of Special Pleading, before it

was invaded by the New York Code of Procedure. Not only was he acquainted with the ordinary matters which occur in the routine of legal practice, but he had obtained a thorough understanding of topics with which few lawyers are familiar. I might instance the case of Charitable Trusts. Mr. Bidwell was engaged in the great arguments of recent times in which that subject has been thoroughly sifted; and, among others, in the leading case of Williams against Williams, in Selden's Reports, when, by his investigations, he aided the late lamented Judge Denio to frame a masterly opinion, in which he followed in the ancient footsteps of the sages of the English Law. Mr. Bidwell's mind delighted in such recondite and remote historical studies. I have known him, when a new phase of that and kindred subjects has been presented, to refer to it with all the interest and glee of boyhood. So, with the whole law of Trusts he was extremely familiar. His mind was of a nature adapted to the refinements appertaining to that subject; and his moral sense was keenly alive to the duties which are imposed upon men who act in a fiduciary capacity. Not only was Mr. Bidwell acquainted in a broad and comprehensive way with the general principles of the law, but he also knew them in such a manner that his knowledge was accurate and ready at hand. His memory was tenacious of details. I recall the fact that on a certain occasion, I had made some search respecting an out of the way and abstruse point of English law, and had been unsuccessful in finding any case to establish the proposition. Having casually met Mr. Bidwell, I referred to the matter, and he at once gave me a case decided more than one hundred and fifty years ago in England, which met the point I wanted. Upon examination I found his memory served him well both as to the nature of the decision and the volume in which it was reported.

It is of such a man as this, whose mind was thoroughly stored with legal principles, and at the same time capable of applying them carefully to practice, that we have to speak to-day. And I ought to add that he was also acquainted with the history and progress of the law. He knew well the lives of particular judges, both in England and America, and how much weight ought to be accorded to their individual opinions. He was also familiar with the lives of the distinguished lawyers of our day and of remote periods, and knew who were conservative and narrow-minded, and also those who were alive to the



work of reform. For this reason his conversation was extremely entertaining. He was vivacious and interesting, and he poured out upon every subject he handled a flood of light.

Mr. Bidwell did not confine himself in his studies to strict legal science. He was fond of the principles of government, was attracted by the theories of political science. I recall the fact that during one whole winter he attended the entire course of lectures of my late distinguished colleague, Dr. Lieber; and never did that gentleman have a more enlightened or interested listener. It was, indeed, a rare thing to see a man of the age of sixty-five years, of Mr. Bidwell's talents and attainments, occupying as it were the position of a disciple upon such a theme.

As a citizen and friend, Mr. Bidwell was a model. He was interested in the elevation of the legal profession. No man more befriended any step which looked towards the progress of legal education. He looked back with regret to the good old times when the name of lawyer and gentleman were regularly associated; and he looked with glad anticipation forward to the days when they should again become so. As has been remarked by my friend Mr. Silliman, no man was more eager to give up the stores of his knowledge to another; and with the utmost alacrity even, and a considerable expense of time—he would render aid to a professional brother. Few that knew him will soon forget his cheerful, kind and hearty ways, or fail to respect his integrity of purpose or purity of life.

He was a decided Christian. His religion was of a bright and sunny type; crowned with practical beneficence. Now, sir, it was fit and proper that a man like this, who had rounded up the full measure of his days, and whose work was done, should instantly cease to live. To borrow the thought of the old poet, he could depart from life as a satisfied guest leaves a perfect banquet, in which not a viand or accessory that could charm the eye or please the taste, has been omitted or badly served.

Such a life as this, it seems to me, is a perpetual benediction. And although it may not have the glitter, or perhaps the false glare, that attends a more brilliant career; yet its pure, white light, shining with a steady effulgence, is most agreeable and satisfying to all who gaze upon it. We may well hold up such a man to the imitation of the younger members of the profes-

sion, for his purity and simplicity of character, for his sound and varied learning, for his absolute fidelity to trusts, for his contented, cheerful and successful industry, for his warm and constant friendship, and for his high-toned morality.

No, sir; the memory of such men does not die; their life is simply exhaled, and it still exists; their thought and wisdom are breathed into their professional successors. I believe with old Lord Coke, that no great lawyer in this sense ever dies without offspring or intestate. His example, his worth, his attainments, pass to his successors, and his successors carry them on from time to time to the remotest generation.

MR. WILLIAM M. EVARTS said:

*Mr. Chairman.*—When one, after a long absence abroad, returns to his home, he feels a certain solicitude covering that brief space of time which he spends upon the ocean, without any means of knowledge of what is happening on either side of the water. Some of our ship's company, alas! on arriving, found that sickness and death had been busy in the nearest relations of life for them, but I, by a kind Providence, have found all near and dear to me, in personal relations, safe and well. But one of the earliest facts brought to my notice before I landed, was the very recent death of Mr. Bidwell, a gentleman, a lawyer, whom I had known almost all the while he had been at this Bar, and longer than I had been myself; whom I never doubted to be one of the very foremost men of our profession, in all the great relations which it bears to human society and to the safety and credit of our community. It was when I was a student in Mr. Lord's office, commencing in 1839, that Mr. Bidwell established his relations with our Bar. Mr. Lord was one of his most intimate, one of his most valued and most valuable friends. I thus was very early brought into personal contact with Mr. Bidwell. A young man, too, knowing the peculiar circumstances of his removal from Canada, and of his adoption of this Bar and this community as the sphere of his usefulness and the scene of all his exertions in life, when I came to the Bar I always had him, in common with other leaders of the Bar, in my mind and in my eye, as one whose example and character it was most worthy for young men to aim to imitate and to emulate.

I can add nothing to what has been said so well, so thoroughly, so truly, and at the same time with so much of warmth and force in praise of the great attainments, of the great and useful labors, of the high and beautiful character of Mr. Bidwell. The circumstances which withdrew him from the community in which his more active personal career would have been filled out with great distinction, induced him, and as it seemed very properly, under very delicate sentiments, very much to abstain from any participation in active political affairs in this country or in this city. But he was always in favor of good government and of good men ; and he did his whole share in that part of the labors of society, which by example and by precept, make the individuals of a community good, in order that their concurrent action may be beneficent. In no eminent relation, in no moral or religious connection, did he fail to bear his full share ; and in all that made up the collective power of our profession, in the relations of its members with each other, and in their solemn maintenance of their duty to the law and to the courts and to the interests of society confided to them, Mr. Bidwell was always prominent, always earnest, always of one opinion, of one action and of one voice.

I cannot think it is entirely just to say (as has been said here to-day) that, as each thread of life is broken, that life has lost its place or its memory in the twisted and continuous cord which is made up of our joint lives, and which goes on unbroken in strength, if the fibers be of the true nature and purity. So is it with these dead lawyers of a past generation ; so is it with those who have passed away under our immediate observation. So let it be with all of us whose labors in our profession shall be worthily interwoven in the texture of the life of our time.

And now that the end, death, has set its coronation to this beautiful and beneficent life, we all can concur in appreciating its value and its service, and in cherishing its memory and imitating its example.

MR. ERASTUS C. BENEDICT said :

After what has been so well said, I rise, only to say a brief word in expansion of what has been said by Mr. Silliman and Mr. Dwight, on the single topic of Mr. Bidwell's religious character.

I became acquainted with him in 1838, in connection with the great ecclesiastical controversy which resulted in the division of the Presbyterian Church, now so happily reunited, since which time I have known him familiarly till his death. We were both connected with that denomination of Christians, whose faith is sometimes said to be austere, gloomy and repulsive. No one would pass that judgment upon it from Mr. Bidwell's example. He had studied the law of God, the doctrines of the church, and the practical truths of the Gospel, with a careful, earnest and conscientious search for truth, and he had read its literature for its effect upon his heart and life. To him religion did not bring the fruitful river in the eye, nor the dejected 'havior of the visage, but indwelling joy. He walked in the way of life with unchanging cheerfulness. He looked upon this world, with all its faults, as God's fair world, and to him the outlook from this to the future life was

"Like the glimpses a saint has of heaven in his dreams,"

and he may well have desired to make the change from the one to the other in the twinkling of an eye, that the weak and timid flesh might not have an opportunity to do discredit to the willing spirit.

Judge NELSON said:

*Mr. Chairman.*—Although I have known our late friend longer than any other person present may have known him, yet, after what has been said, I should be silent but for the belief that his character was best exemplified in that field of labor which he occupied prior to his removal to this State. With that belief, I accept the suggestion, so kindly made, that some more extended reference to his life in Canada may not now be inappropriate. But in recalling events—the earlier from family tradition and from what I may have read, the latter from personal observation and intercourse—I may not be fortunate in selecting what best illustrates his genius and character, and shall need your indulgence.

With relation, sir, to the learning he possessed when first he appeared before *you* in his practice here, consider, for a moment, his early advantages. As has been said, he went to Upper Canada in his boyhood, but his father, Barnabas Bidwell, had been the Attorney-General of Massachusetts, was a profound

jurist, a man of great culture and attainments, outside of the law as well as in it. He was distinguished for his courtly and agreeable manners, his great conversational powers, his mental and personal activity.

When the family went to Canada it consisted of the father, the son, and a daughter who never married. They settled in Bath, a village on the bay of Quinte, eighteen miles above Kingston, and resided there several years. In due time the son was articled as a student to Mr. Washburn, and afterward to Daniel Hagerman, Barristers and Attorneys at Law. Before he had fully completed the term of formal legal studies, the family removed to Kingston. It is known that the elder Mr. Bidwell gave some attention to office consultations, and that the son's preparatory and legal studies had received his immediate and constant aid and supervision during all those years; and what a tutor he must have been! He who can remember, as indeed which of us may not, how in the solitary studies of his student life he was perplexed and hindered, the best authors having left rules and principles involved in mystery, the spirit of the law remaining inarticulate, can appreciate the worth of such a tutor, coming, in perfect sympathy, with explanations, analogies, illustrations. The page else so dark flooded with light.

At that time the Judges of the Court of King's Bench were sent over from England, and it was not expected that a young gentleman, on attaining to the dignity of a Barrister, would directly proceed to the trial of causes. But in this instance some special circumstances may have precipitated action—perhaps the loss of Mr. Washburn, or of Mr. Hagerman, both of whom died early in their professional lives; or, perhaps, a sense of duty and fitness. But, from whatever cause, young Bidwell, as he was then called, directly after his admission to the Bar, went in and tried causes with signal ability and acceptance. Some time later, when there during my school vacations, I was allowed to haunt the courts, and saw Mr. Bidwell try many causes. Then, as in years afterward, I saw his father, who was never admitted to practice there, sit at a table below the seats allotted to the barristers, and when his son was engaged, hand up memoranda and books. As that was the common course, and as the books were always handed up at the right time to meet or to support an objection, or for citation on

the argument, the received notion was that the causes which the son tried so well, and with such affluence of learning, had been previously argued in the seclusion of the law office.

I recollect the trial of an early case, which excited some popular attention and anxiety, that of *Hawley vs. Ham*, an action by the father-in-law against the son-in-law, to recover for the support of the wife, from the time when, owing to the alleged cruelty of the husband, she fled from his roof to her father's protection. It was said that the action had been brought to test some principle. Mr. Bidwell was for the plaintiff; the Attorney-General for the defendant. The validity of the marriage was contested, the Attorney-General claiming that the Rev. Robert McDowell, a preacher of the Dutch Reformed Church, settled near Bath, was not competent to perform the marriage ceremony, the parties concerned in that sacrament not having been members of his church.\* But the ruling of the presiding Judge on the question of cruelty was the most striking feature of the case: he held that the husband had the right to inflict personal chastisement on the wife, when she was disobedient or refractory.

Early in Mr. Bidwell's professional career he attained great celebrity, and thenceforth, while he remained in practice there, his services as counsel were sought for in causes of importance in every part of the Province.

But, sir, without extending these details, you will accept the suggestion that our late friend had great, very great special advantages in preliminary and legal study, and during several years of his practice at the Bar. When we add to that large and generous preparation and aid, that Mr. Bidwell, generally, was in good health, was devoted to his books, that principles which had served important uses, and were infused with a spirit of equity, were very dear to him, it could excite no surprise that those who were so lately at the Bar with him and knew his resources so well, are enabled to ascribe to him such learning and research.

\* The Rev. Robert McDowell was a native of Washington county, in this State, and went to Canada about the year 1798. He was a great friend of the Messrs. Bidwell, and of considerable Provincial influence. His eldest son, John R., after spending some years at Princeton, N. J., preparatory to the ministry, settled in the city of New York, and published the "*McDowell's Magdalene Journal*."

J. N.

Mr. Chairman, some reference to his religious influence.

Early in life, and while yet a student, he united with the Presbyterian Church, and was thenceforward an earnest and devoted Christian.

So, too, while thus a mere student, he married Miss Wilcox, whose family lived on the bay near Bath, a lady of exemplary piety, and, as some present well know, of great social worth. My personal acquaintance with her dates from some years after the marriage, but before she had lost her health, when she was distinguished for her active Christian benevolence. His sister had great devotion, and gave to moral and religious efforts her countenance and support. Thus it was that those influences which act so powerfully in giving moral tone and strength to the heart, surrounded our late friend from his very youth.

The Messrs. Bidwell, in connection with others, but especially in connection with Dr. Armstrong and Mr. John G. Parker, both of whom suffered in the rebellion to which reference has been made, built a Presbyterian Church in Kingston, and supported a preacher in it for several years; a church less imposing than the Scotch Kirk there, a church for the common people.\* They also brought out missionaries from these States and from Scotland to labor there, and gave them generous support.†

I had, years ago, a collection of Mr. Bidwell's speeches, as they were published from time to time in pamphlet form, delivered at the Bar, in Parliament, at meetings of the Bible,

\* Dr. Edmund W. Armstrong stood in the front rank of Physicians and Surgeons in Kingston. He left Canada owing to the Rebellion, and settled in Rochester, in this State, where he still resides. No man feels Mr. Bidwell's death more acutely than he. Mr. John G. Parker had been a merchant in Kingston, and at the time of the Rebellion resided in Hamilton. He was convicted of treason, *upon informal confession*, and was sentenced to penal servitude for life in Van Diemen's Land, but on his way thither was intercepted, in England, at the instance of Mr. Roebuck, Mr. Hill, and other liberal members of the Bar, and was finally pardoned and released. Unfavorable treatment of his case appears in 9 Adolphus & Ellis' R., p. 731, and in 5 Meeson & Welby's R., p. 81. J. N.

† The last of those, and the most distinguished, the Rev. David Murdock, remained in the Province until after the Rebellion, when, finding his old friends dispersed, he came to this State, was for a time at Catskill, then called to Elmira, where he labored on until the close of his life. A son of his has been the District Attorney of Chemung County; another son is a Physician at Oswego. His relations with Mr. Bidwell were of the most affectionate kind to the last. J. N.

Missionary and Tract Societies, in different parts of the Province, and had got, quite early in my studies, a strong impression of his power as a speaker and writer ; an impression confirmed by subsequent reading and observation.

But, as contrasted with the great occasions when, in the presence of clouds of witnesses, such speeches were delivered, take an instance of labor quite obscure. Mr. Edwin Clark, of Oswego, said to me ; "When I was over at Kingston I became acquainted with Mr. Bidwell. I strolled out in the morning, saw the sign of a Sunday school, went in and found him teaching a class." Such was his humility and devotion.

Mr. Chairman, a brief reference to his attitude in Parliament.

Some circumstances conspired to render his position, at first, trying and peculiar. His father had been regarded as a radical in politics. He had, in the press and otherwise, taught what he considered the rights of the people, under the democratic element supposed to reside in the constitution, and had criticized the policy of the government. He was an affirmative, an aggressive man ; a great controversialist. He had drawn upon himself the disfavor of the Tory party, the enmity of some of its distinguished members. Eminent lawyers, the brothers Charles and Jonas Jones, Mr. Attorney-General Robinson, Mr. Boulton, and Mr. Solicitor-General Hagerman, had sought to lessen his influence, and in the press and in pamphlets had controverted his views. Many, if not all, of the questions upon which they differed, however important then, have, in changes and new combinations, lost their significance. Mr. Bidwell, senior, had been elected to Parliament for the counties of Lennox and Addington, but, some irregularity having been found in the proceedings, he was unseated, and, directly thereafter, an act as to the qualifications of members was adopted, with a provision that no person who had held office in the United States should sit in that House, thus rendering him ineligible. It was to fill the vacancy thus created that the younger Bidwell was chosen. As he was then only known as a brilliant young barrister, of fine presence and manners, his political views not yet sufficiently pronounced to indicate their real character, it remained for him to assert his position, and, as best he could, to win the public confidence. It is apparent, therefore, that he must have taken his seat in the House under a sense of great embarrassment.



At that time the Episcopalians, a branch of the established Church of England, and the Calvinists, known as the Scotch Kirk, an off-shoot of the established Church of Scotland, were well planted, and had affirmative rights, governmental recognition and support. Not so with the great body of Christians known as Dissenters, the Presbyterian, the Dutch Reformed, the Methodist, and other less prominent churches. They labored under disabilities, and the question raised in the case of *Hawley vs. Ham*, as to the validity of a marriage, may, in some degree, indicate how the Dissenters were cramped and hindered in their efforts, and the frail or uncertain tenure by which necessary powers were held.

Mr. Bidwell introduced bills for the relief of all these churches. His first efforts met with opposition; an apparent indisposition, save on the part of the Reformers, then in a minority, to accept changes recommended by him. But when, from the earnestness and gentleness with which he presented his views, the respect with which he treated the opinions of others, they came to know what manner of man he was, he secured influence, and those and many other reformatory measures introduced by him were adopted, with great and wide-spread public benefit.

One measure to which Mr. Bidwell gave great attention, a bill to abolish the law of primogeniture, did not go into effect while he remained in Parliament. He introduced the bill again and again, supported by extended arguments; it was passed more than once in the House below, defeated in the House above. But after Mr. Bidwell had ceased to be in Parliament, and probably upon the Home government, moved by those arguments, intimating to the provincial administration that the measure was not objectionable, that change in the law was made; so, even in that, he lived to see the fruit of his labors.

Some special circumstances which occurred at one session while Mr. Bidwell was Speaker, may be noticed. At a time when the Reform party had a strong majority in the House, the Governor, Sir John Colborne, was exhibited in effigy at Hamilton. Each party charged the act upon the other, the Reformers especially claiming that it was a device of the enemy to excite prejudice against them. The House appointed a committee of investigation, with power to send for persons and papers, and Mr. McNabb, a young lawyer of Hamilton, and Mr. Solicitor-General Boulton were cited to appear and be examined. They

refused to answer certain questions, and having been reported to the House, were required to attend and answer for the contempt.

Mr. McNabb came first, and not exercising much discretion, was punished by actual imprisonment. But, as his party regarded him as a martyr, the event gave an impetus to his fortunes, and so it was that, instead of living, as he might have done, an obscure lawyer in the town of Hamilton, he became a member of Parliament, and died Sir Allan McNabb.

When Mr. Solicitor-General Boulton came before the House, he understood its spirit, and so adroitly explained his offence that, after debate, it was resolved that he should be reprimanded by the Speaker.

Now, sir, please to observe that the Solicitor-General had been a principal opponent of the elder Mr. Bidwell, had favored his removal from the House, and the adoption of the special statute which had closed the doors of Parliament to him forever; that, as the newspapers of the day had it, there was a deadly feud between the Bidwells and the Boultons; great concern on the part of Mr. Boulton's friends lest he should be roughly handled; great exultation on the part of the Radicals, that one of the chief opponents of the father was to receive punishment at the hands of the son, the notion being that the son would pay off all his father's old debts.

It was said in a non-partisan journal, that the occasion when the Solicitor-General was brought to the bar of the House was one of great ceremony and solemnity; that in the first part of the reprimand, when the Speaker was vindicating the power of Parliament, and stating that he could not forget that its power and dignity had been offended and sought to be impaired by one who was the legal adviser of the government, an example most pernicious, Mr. Boulton appeared calm, if not indifferent, but that as the Speaker proceeded and administered the required reproof, with such magnanimity and forbearance, that a mere observer could not have told whether the offender was or was not the friend of the Speaker; Mr. Boulton, recognizing the presence of a superior mind and heart, was humbled, and finally left the House profoundly affected. The London Times, in publishing that reprimand, declared it to be the best paper of the kind on record.

These circumstances, though historical, the actors all or nearly all gone now, are not without present interest as illustrating

how our late friend, when charged with the performance of a great constitutional duty, could rise to the dignity of the occasion, quite above mere personal and party griefs and dissensions, and discharge that duty in the sovereign spirit of a great magistrate.

Thus, Mr. Chairman, from that field of public and private service, a service covering so many years, and abounding in incidents worthy of being treasured up, I gather these few detached particulars. The presentation, though inadequate, may be suggestive of an honorable ambition in the profession, a devotion to the public welfare, a Christian patience, humility and consecration worthy of remembrance.

Mr. Barnabas Bidwell died at Kingston. Afterwards, our late friend, declaring his intention to take no further part in politics, removed to Toronto, and devoted himself to his professional duties until the Rebellion came.

The peculiar and painful circumstances under which Mr. Bidwell was suddenly required to leave the Province, have been stated by Mr. Silliman. It was well that one who, from thirty years of personal friendship and professional intercourse, knew what had been the delicacy of Mr. Bidwell's feelings, should have made that statement. Prior to the recall of Sir Francis Bond Head, Mr. Bidwell had sought to persuade himself that, in requiring him to leave the Province, Sir Francis had acted under a misapprehension, and from good motives, and, beyond the simple and necessary declaration that he had not sympathized with or favored the rebellion, Mr. Bidwell preserved toward the public a dignified silence.\*

\* It should not be assumed that Mr. Bidwell tamely accepted the condition imposed as to his leaving the Province. He was under terrible constraint; a duress having few precedents. In the interview to which the Governor had called him he was assured that martial law was about to be declared; that his actual imprisonment was inevitable. Sir Francis, in great apparent tribulation, and with tears, assured Mr. Bidwell, whom he called his friend, that he would not be able to protect him; that his safety depended upon his departure from the Province. At that time the popular excitement and turmoil were very great, and the extent of the rising throughout the Province, and its probable duration, could not be known. However free Mr. Bidwell may have been from all taint of complicity in the rebellion, the imminence of martial law, and the prospect of indefinite imprisonment, might have been sufficient to appal a stouter heart. A consciousness of innocence, with no hope of being heard in declaring it until

But though he thus maintained a dignified silence here, the people there were not silent after the turmoil created by the Rebellion had passed away. They regarded his absence as a great loss. But, perhaps, in no case, could the undeserved exile of a distinguished man have called forth more signal rebuke than that administered in a controversy originated and carried on by Dr. Egerton Ryerson, a writer of great power, in which he arraigned the Governor and his advisers for the manner in which Mr. Bidwell had been treated. Mr. Ryerson has since held important relations to the government, and is now the Minister of Public Instruction in the Province.

Now, Mr. Chairman, you will observe that the professional connection thus built up by so many years of effort, was of great value; that while Mr. Bidwell may have known that he was favorably regarded in England, he could not have known that his appointment as a judge had been contemplated; also that the office, one of great dignity and importance, might well have been acceptable to him, as the highest testimony to his life and character, to the wisdom of his conduct in Parliament, and as opening to him a career of great usefulness in the administration of justice.\*

after long deprivation and suffering, would not have given the most sanguine much strength. It has been believed, and, I think justly, in view of the real character of Sir Francis, as subsequently disclosed, and of strictures published by him in England unfriendly to Mr. Bidwell, that the consent thus wrung from him was not unwisely given.

J. N.

\* The English government had, in effect, indicated its approval of Mr. Bidwell's moderation in proceedings which excited the Provincial Parliament in 1832 and 1838. A member of the House, who was the editor of a newspaper, was expelled for publishing libels upon other members, and upon the Legislative Council. He was re-elected and expelled several times in quick succession. The case had no precedent in the action of the British House of Commons, in the expulsion of Wilkes and in declaring him ineligible, as legal proceedings had been taken against him, and as the resolutions expelling Wilkes, and declaring him incapable of re-election had been, by the vote of the House in 1782, expunged from its minutes, as subversive of constitutional rights. Without justifying or seeking to palliate, the offence of the editor, Mr. Bidwell questioned the power of Parliament to take cognizance of it; thought that the question of guilt and punishment belonged to the courts of law; that it was not wise or proper for members of the House, however much aggrieved by the publications, to act as prosecutors and as judges, and that the pro-

Bearing all that in mind, I ask your attention to the occasion when, on his way to England, Sir Francis Bond Head invited Mr. Bidwell to see him at the City Hotel in this city. At that interview, and at the close of a long conversation, Sir Francis said to him (I give the substance; not, perhaps, the words): I think I ought to tell you, Mr. Bidwell, that you are the cause of my being recalled. Mr. Bidwell testified his surprise, and assured him that he was under a misapprehension. No, said Sir Francis, the facts are these: I was instructed by the Colonial Secretary to place your name on the list of judges of the Court of Queen's Bench, and was induced to send a remonstrance. That instruction was renewed, and, influenced by my advisers, a further remonstrance was sent. Afterwards I received notice that my successor had been appointed. So you see I am correct. Mr. Bidwell, then, perhaps, calling up in review all that he had lost and suffered, said: You may be correct in that, sir, but I now see why it was desired that I should leave the Province: you wished to be able to say to your superiors, whom you had disobeyed, that the man they intended to honor was a rebel, and had left the country. Mr. Bidwell retired without ceremony.

But, showing the gentleness of that man's spirit, a gentleness exceeding that of woman, one who could not let the sun go down upon his wrath, Mr. Bidwell told me afterwards that he had not walked more than a block from the hotel, before he felt ashamed of having been in such temper, and was inclined to return and say so to Sir Francis, and bid him a respectful fare-

ceedings were infractions rather than vindications of parliamentary privilege. He voted against each of the expulsions. Mr. Boulton, then Attorney-General, and Mr. Hagerman, Solicitor-General, were members of the House, the recognized leaders of the Tory Party, and voted for those expulsions. The English ministry not only adopted Mr. Bidwell's views, but, regarding Mr. Boulton and Mr. Hagerman as responsible for those violent and ill-advised acts, signified its disapprobation by dismissing them from office. They went to England to exculpate themselves and seek restoration. Mr. Stanley had, happily for them, succeeded Lord Goderich as Colonial Secretary. Mr. Hagerman, who had been more moderate than Mr. Boulton, was allowed to resume his official relations to the government. Mr. Boulton was not restored, but was sent to Newfoundland as Chief Justice. His friends regarded that transfer as little less than expatriation. He soon became embroiled in difficulties there, was dismissed, and never after called to any public employment. J. N.

well. I said to him I was glad he did not ; that the case called for a good degree of righteous indignation ; and reminded him that one had said, " I do well to be angry." He smiled and told me to look up that passage and observe the connection.

Mr. Chairman, he who adds one good word, one new application of a principle to the science of the law, leaves that science his debtor. Thus the great masters of the law have toiled for us, and we have entered into their labors. But, sir, our late friend would not have been disturbed by the thought that the known relation of the workman to his work would soon be forgotten, though the work remained. As some of us look down the vista of the coming years, the clouds may gather and darken, but to him that vista opened to a world of light. His general views as to the future state may be inferred from his life. But, as further indicating those views, I may be indulged in speaking of a touching and affectionate letter which I received from him in November, 1860, in reference to the then recent death of my father. That letter may have been written with tears, as they were near and dear friends. But in its tone and spirit it savored somewhat of congratulation. He seemed to think that his old friend, at his great age, had fitly retired, had been blessed by a transition as from toil to rest, as from dusty roads of weary travel to the house of many mansions, as if the present were the unreal and the unseen, the future the known and the seen, as well as the eternal. That transition, so full of peace, became his own : the dusky wings fanned his brow faintly, as the mysterious veil was drawn aside and he passed on. I am persuaded, sir, that if he could have had a moment's regret in the prospect or in the article of closing this life, that must have been imposed by the thought of leaving those who were cherished in his great and loving heart.

I feel, sir, a melancholy satisfaction in adding these feeble words to the other and higher testimony of our common respect and love for the memory of a great and good man.

*PROCEEDINGS IN THE COURT OF APPEALS OF THE STATE  
OF NEW YORK, ON THE 11TH DAY OF DECEMBER, 1872,  
ON THE DEATH OF MARSHALL S. BIDWELL, ESQUIRE.*

Mr. HENRY NICOLL presented the resolutions adopted at the meeting of the Bar of the City of New York, on the 2d day of November, 1872, and respectfully asked that they be entered on the minutes of the Court.

Mr. AMASA J. PARKER thereupon addressed the Court as follows:

If the Court please, I rise for the purpose of seconding the request of Mr. Nicoll. I had the pleasure of an acquaintance with Mr. Bidwell for more than a quarter of a century, and I have had the opportunity of observing him from different stand-points. On the Bench, I listened to him with the most sincere respect for his learning and ability; at the Bar, I found him a most formidable antagonist. Everywhere and by all who knew him, he was conceded to occupy, most worthily, a place in the front rank of the profession, and was esteemed for his unquestioned integrity, and beloved for his social and personal virtues.

Mr. Bidwell accomplished successfully a change in which most men would have failed. Impelled by political considerations, in his mature years, he left Canada, where he was educated and where he had long been engaged in successful professional practice, and established himself in the city of New York. Very rarely, before, had such a removal proved successful. The difficulties to be encountered under such circumstances have generally been deemed insurmountable. It is like transplanting the full grown oak, and tearing from their native soil its wide spread roots, in the hope of preserving the vigor of its life when planted again in a distant field. But Mr. Bidwell overcame every obstacle, and soon rose to professional eminence in his new theater of action. Success under the discouragements of such an experiment affords the highest evidence of industry, talent and personal worth.

I have heard Mr. Bidwell spoken of in Canada, by those, who, from their connection with the courts and with public affairs, had the best opportunities of knowing him while he resided there, and they always expressed for him the most sincere

respect and esteem. Such was, I am sure, the sentiment of all parties there. It was conceded that if he had remained in that Province, he would have won its highest judicial honors.

We cling fondly to the memory of our deceased friend. He combined, in his character, the qualities which we most respect, esteem and love, and while we mourn his death, and follow him sadly to his last resting place on earth, it is consoling to remember, that he had completed the full age allotted to man, and that in closing a successful and honorable career, he has left behind him the fragrant record of a well-spent life.

It seems to me eminently proper, and I join in the request, that the proposed entry be made on the minutes of this Court, in honor to his memory.

Mr. A. J. VANDERPOEL said:

May it please the Court, I desire to unite in the request made that this Court should join in the tribute of respect and affection to the memory of Marshall S. Bidwell. Mr. Bidwell was a model man in all relations of life, and in his professional career he exhibited the highest type of the true and accomplished lawyer. More than thirty years ago, in the prime of his physical and intellectual manhood, he joined our Bar. The galaxy of lawyers who then were eminent, whom the Courts delighted to hear and their brethren to honor, found in him their peer.

It was apparent, at the outset, that his vigorous intellect had been cultivated and refined by study, so that he was able to take and at all times to maintain his place in the foremost rank of lawyers. He eschewed public life, and his ambition was gratified when in his daily walk and conversation he proved himself the noble lawyer and Christian gentleman. Mr. Bidwell excelled in that class of cases which come before the Courts, involving the construction of devises and trusts, and the more intricate of the class of questions in commercial law, constantly arising in the transactions which center in our great city in its trade with foreign countries.

I recall his argument before the Court in about the year 1866, involving the construction of the Will of Richard Ray. Mr. Bidwell represented the appellant, and Mr. Lord the respondent. It afforded a pleasant excitement and interest to the members of the Bar then present to follow the able and experienced counsel, as they, with a zeal wholly untempered by age, presented



to the Court the learning of the sages upon the intricate question under discussion.

No one among us was more familiar with the "great book of equity," nor with the rules of the common law, or more accurate in their application. The lives of the eminent lawyers of all ages were with him a constant study, and while he emulated them in all that was great and good, he avoided their foibles. The old race of lawyers are rapidly leaving us. It is becoming that we should not be remiss in recording and transmitting our respect for their virtues.

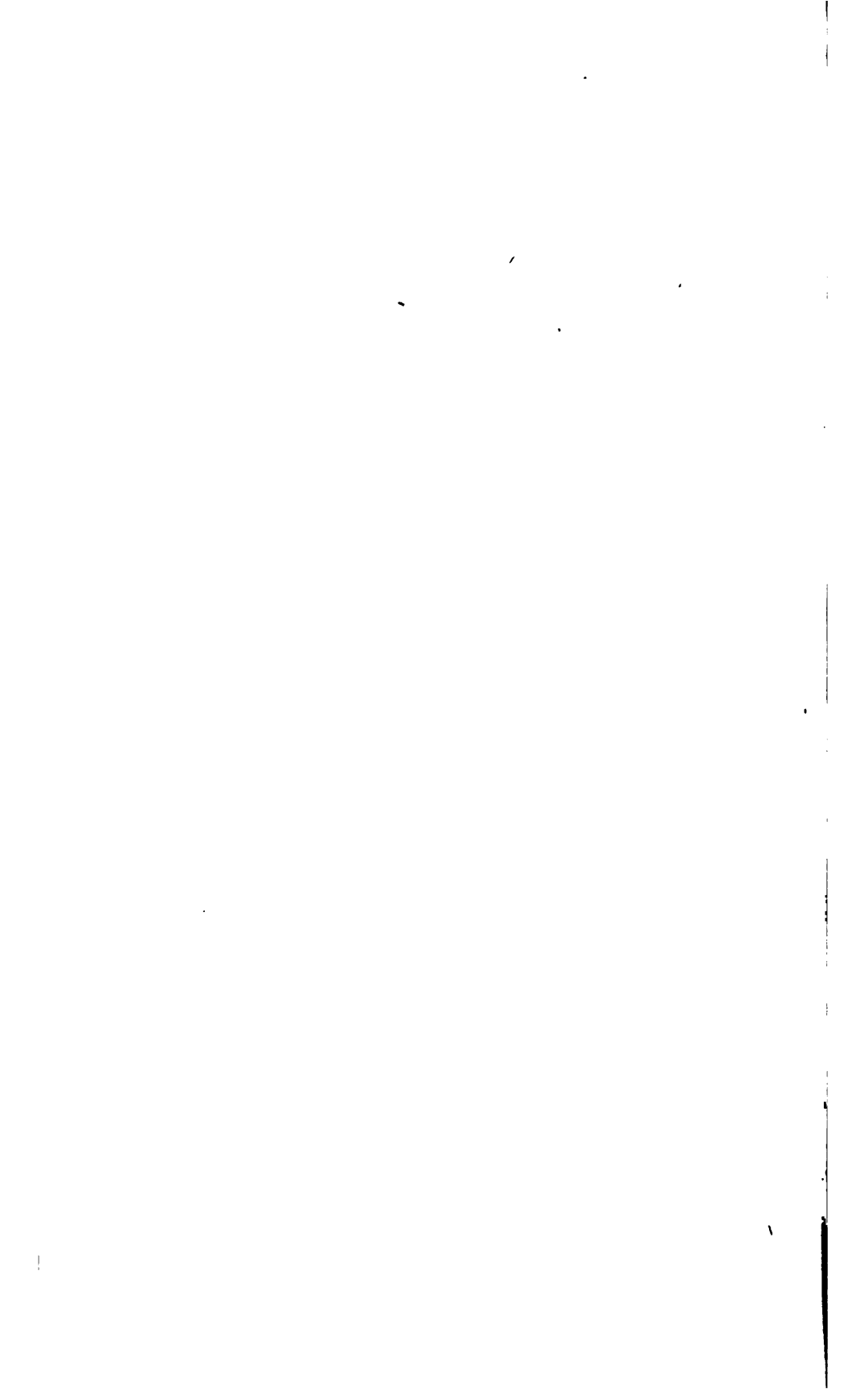
**Mr. Chief Justice CHURCH said:**

The members of the Court concur fully with the sentiments contained in the resolutions, and those which have been so well and feelingly expressed upon this occasion.

Mr. Bidwell was one of those who, when he appeared professionally in the Court, always impressed us by his argument with his profound and accurate legal learning, and by his deportment and manner with his perfect sincerity and dignified refinement.

His great learning and ability, not less than the purity of his private character and kindness of heart, endeared him to all who had the pleasure of his acquaintance during his life, and will embalm his memory in grateful remembrance, now that he has departed from among us.

The motion to enter the resolutions upon the minutes of the Court is granted, and as a further mark of respect, the Court will now adjourn.



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## ABUSE OF POWER.

*See* CORPORATION, 10, 11.

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*See* GIFT, 4, 5.

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## ACCORD AND SATISFACTION.

The owner of a mortgage made an unwritten agreement with the mortgagor to satisfy it if he would discharge a claim due from a third person to an estate of which he (the mortgagor) was sole beneficiary by will. The latter, with approval of the executor of the estate, gave a receipt for the claim, and released the executor from and indemnified him against all liabilities of the estate. *Held*, that there was an accord and satisfaction, and the mortgage was discharged. *Grinwold v. Grinwold*. 72

*See* PRINCIPAL AND AGENT, 1, 2.

## ACCOUNT.

1. The plaintiff proved a book account charged against A., but the credit was intended to be given to B., and the charge so made at his request and for his convenience. *Held*, that the undertaking of B. was not collateral, but the credit was wholly to him. *Green v. Dibrow*. 381

2. A. lived on B.'s farm, which was carried on for B.'s benefit and

under his control. No specified compensation was paid to A. for services performed and hands boarded by him. A. at different times delivered butter and eggs to the plaintiff, at B.'s suggestion that they should be so delivered to apply on the account; and the value of the articles was so applied. B. saw the account and did not object, and afterward promised to pay it. The butter was from milk of cows, and the eggs were from fowls owned by A. and B. together, but kept on the farm, and used in common.

*Held*, that the articles were delivered for the account of B. *Id.*

3. *Held*, also, that the articles were not to be regarded as having been delivered in part payment of the account, but as items of a mutual, open and current account, where there had been reciprocal demands. *Id.*

*See* EVIDENCE, 20 to 27.

## ACCOUNTING.

1. In an action to compel an accounting, all persons interested in obtaining the account must be made parties. *Petrie v. Petrie*. 90

2. The rule applies, it seems, in an action to compel the accounting of an executor to legatees who, in receipting for legacies, have given agreements to refund, and in an action for an accounting by trustees to the personal representatives of a deceased co-trustee; especially if not conceded that no part of the trust estate was received by the deceased trustee. And

where such fact is conceded,  
*quere.* *Id.*

3. Where there are no representatives of the trustee appointed, they should be appointed before suit, and made parties. *Id.*

4. Persons entitled under a will to allowance out of the income of the testator's estate for their education, are necessary parties to the accounting of an executor. *Id.*

*See* PARTNERSHIP, 8 to 12.  
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#### ACKNOWLEDGMENT.

1. Where a wife is introduced to the officer taking her acknowledgment to a deed by her husband, in the presence of his brother, both known to the officer, there is sufficient ground for his certificate of knowledge of the grantor; though, if mistaken, the deed would be avoided. *Reaford v. Reaford.* 6
2. Where the wife making an acknowledgment made no reply to the questions put by the officer as to the execution of the deed by her freely, &c.,—*Held*, that her assent might be implied from her silence *Id.*

#### ACTION.

1. An action, on behalf of the plaintiff and other tax-payers, to recover a tax alleged to have been unlawfully collected, and to restrain its disbursement by injunction, none of the other tax-payers appearing to join with him, will be regarded as the personal action of the latter. *Kilbourne v. Allyn.* 352
2. Nor will such an action lie on behalf of other tax-payers, entitled to distinct payments out of the whole tax collected; or to prevent a multiplicity of suits, where the pleadings and evidence fail to indicate any purpose of others to sue,

or their dissent from the proposed disbursement of the money. *Id.*

3. And where it is neither alleged nor shown that other tax-payers are dissatisfied with the intended disbursement, a judgment directing repayment to them, for which they do not apply or authorize an application, cannot be sustained. *Id.*

4. Where a wrong-doer sells property illegally taken, the owner may waive the tort and sue for money had and received; and where the property taken is money, it may be recovered in such an action without waiting for the formality of a sale. *Tryon v. Baker.* 511

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AGRICULTURAL SOCIETY.

1. An incorporated agricultural society may employ persons to preserve order on its grounds during a fair. (See Laws 1859, p. 62.) *Magovern v. Staples.* 145
2. It is the duty of those employed to preserve order, and they may put off from the grounds persons who persist in causing disorder, after they are requested to desist therefrom, and enforce the lawful regulations of the society, which are made known to those admitted to the grounds. *Id.*
3. The society may place seats upon a part of its grounds, and charge an additional price for admission thereto to one holding a ticket to the grounds generally. *Id.*
4. But its officers and police may not justify the forcible exclusion of such a person from the seats be-

cause he has not paid for their use, without charging him with knowledge of the requirement, and with refusal upon demand to pay or leave. *Id.*

5. And a refusal of the holder of a ticket to the fair to leave the seats will not justify his removal from the grounds to which his ticket admits him. *Id.*
6. A custom to charge for the seats, of which the person removed is not shown to have knowledge, is not admissible as evidence in justification of his removal. *Id.*
7. But evidence of a regulation of the society, establishing and authorizing the collection of additional charge for the seats, is material upon a question of unlawful exclusion by an officer, to show the authority for the demand of payment, &c. *Id.*

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ALIENS.

1. The act of November 26, 1827, authorizing certain resident aliens to take and hold real estate, conferred, *it seems*, upon their heirs the right to inherit, notwithstanding their own alienage. *McCarty v. Terry.* 236
2. But that rule does not apply to a case where the ancestor afterward became a naturalized citizen. After his naturalization he held his property, not under the act, but under the same law as every other citizen, and alien heirs could not, therefore, inherit from him, unless he had complied with the provisions of 1 R. S., 719, 720. *Id.*

## ALIMONY.

1. An order for alimony, *pendente lite*, is superseded by the judgment. *Wood v. Wood*. 204
2. If future alimony ought to be paid after judgment, a clause to that effect should be inserted in it. *Id.*
3. Or if reasons exist for its payment pending an appeal, a fresh application should be made. *Id.*
4. It seems the rule is the same in respect to all orders made upon interlocutory applications. *Id.*

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An order denying a motion to dismiss the complaint on the ground that the summons does not contain the proper notice, does not, *it seems*, affect a substantial right, and is, therefore, not appealable to the General Term. (*Per MULLIN*,

P. J.) *McCourt v. N. Y. C. & Hudson R. R. Co.* 75

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*See* N. Y. CITY AND COUNTY, 1 to 8.

## ASSOCIATION.

*See* PARTNERSHIP, 8 to 12.

## ATTACHMENT.

1. It seems an affidavit, on application for an attachment to a justice of the peace, showing grounds under the Revised Statutes and also under the act of 1831 (chap. 300, § 30, &c.), will authorize its issue under either. *Reinmiller v. Skidmore*. 161

3. And when a summons has been taken out against the defendant in the attachment, and the subsequent proceedings are in conformity with the act of 1831, that it may be presumed to have issued under that act, and although it contains a recital that it is issued upon proof that the defendant is about to depart, &c. *Id.*

3. If the justice approves the bond it will uphold his jurisdiction against a stranger to the proceedings, *e. g.*, a lessor of the property levied on, not party thereto, notwithstanding a mistake in the condition, *e. g.*, an omission to provide for the payment of all moneys received from the property levied on, over and above, &c. *Id.*

4. Reversal of the judgment in the action on which execution has issued against the attached property does not, it seems, invalidate the levy or sale, or make either the party or officer a trespasser. *Id.*

5. It merely annuls the title acquired through the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come. *Id.*

6. One holding a chattel for a time, *e. g.*, a year, paying monthly sums for a particular use and no other, and prohibited from selling or loaning, is not a lessee, but mere licensee, having no interest liable to an attachment against his property. *Id.*

7. Proceedings under attachment (Code, § 237) are ineffectual to reach a debt, due on account to the defendant in the action, where the sheriff fails to give notice of the levy to the debtor. *Clark v. Warren.* 180

8. A chose in action is incapable of seizure by the sheriff. *Id.*

9. It seems a chose in action is excepted from sale by subdivision 2, § 237, Code. *Id.*

*See EVIDENCE, 6, 7.*

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## CANAL BOARD.

1. The direction of the statute (chapter 353 of 1849, § 4), that whenever the canal board shall, upon the hearing of any appeal from the award of the canal appraisers, reverse or modify such award, they shall state in the resolution or order relating to such appeal the grounds of such reversal or modification; and how much, if

any, such award is increased or diminished is not merely directory but positive and peremptory, and a compliance with it is essential to the validity of any decision of the board in such case. *People ex rel. Seymour v. Canal Board.* 220

2. If the resolution or order is not in compliance with these provisions, it will be set aside upon *certiorari*. *Id.*

3. And this will be done, notwithstanding the decision of the board is made, by the statute, final and conclusive. *Id.*

4. The fact that, after the issuing of the writ, the board rescinded the resolution by which their decision was made, can have no effect upon the relator's right to a judicial construction of the act complained of. *Id.*

5. Nor can the court, in a case where the decision is made by statute final and conclusive, look into the merits, or render judgment on the award. *Id.*

6. In such case, the power of the court is confined to the question whether the tribunal had jurisdiction to perform the act complained of, and in its performance has kept within the powers given it by law. *Id.*

*See* RAILROAD COMPANY.  
NEGLECT, 3 to 7.

## CASES AFFIRMED, REVERSED, &amp;c.

*Allen v. White* (57 Barb., 504), reaffirmed. *Hall v. Siegel.* 106

*Chase v. City of Lowell* (7 Gray, 35), approved and followed. *Argus Co. v. Mayor of Albany.* 244

*Granite Bank v. Ayers* (16 Pick, 392), approved and followed. *Bryan v. Baldwin.* 174

*Mack v. Patchin* (42 N. Y., 171), explained. *Gallup v. Albany Railway.* 471



*Morris v. Mowatt* (2 Paige, 586), held applicable and followed. *Raynor v. Selmes*. 440

*White v. McNett* (33 N. Y., 371), applied. *Prendergast v. Borst*. 449

### CATTLE.

*See* DAMAGES, 1 to 5.

### CAUSE OF ACTION.

*See* ACTION.

### CERTIFICATE.

*See* CORPORATION, 13.  
ELECTION, 1.

### CERTIORARI.

1. A petitioner for bonding a town for railroad purposes may bring a *certiorari* to review proceedings of the county judge thereon, which have been illegally conducted. *People ex rel. Youmans v. Wagner*. 467

2. A *certiorari* brought in the name of A. B., "supervisor of the town of, &c.," may be regarded, if the supervisor has no authority, as the individual proceeding of A. B. *Id.*

3. And so it may be regarded as the proceeding of the town, if the individual is not entitled to institute it. *Id.*

4. The town may bring the proceeding to review the action of the county judge. *Id.*

5. Petitioners may withdraw their signatures at any time before the final submission of the matter to the judge. *Id.*

6. On proceedings upon the petition, the contestants offered to have certain petitioners appear and withdraw their consents. *Held*, that it

was error to reject this offer upon a general objection, and that the objection that the petitioners were not actually produced could not be first made upon review. *Id.*

7. It is not essential that the parties opposing the proceedings before the county judge should be named in his return to a writ of *certiorari*. *Id.*

*See* CANAL BOARD, 2 to 7.

### CESSANTE RATIONE, &c.

*See* EQUITABLE CONVERSION, 1.

### CHARGE

*See* EXECUTORS AND ADMINISTRATORS, 21, 22.  
PURCHASER PENDENTE LITE, 1, 2, 3.

### CHARGE TO JURY.

*See* DAMAGES, 1.  
ELECTION, 2 to 7  
PRACTICE, 11.  
TENANTS IN COMMON, 6.

### CHARITABLE USES.

*See* TRUSTS AND TRUSTEES, 6, 7.

### CHARTER.

*See* STATUTE OF FRAUDS, 6.

### CHECK.

*See* NOTES AND BILLS, 1 to 8.

### CHOSE IN ACTION.

*See* ATTACHMENT, 7 to 10.

## CITATION TO PROVE WILL.

*See* PROBATE OF WILL, 1.

## CITIES.

*See* LEASE, 2, 3, 8.

MUNICIPAL CORPORATION, 1 to 5.

STATUTE OF FRAUDS, 1 to 7.

## CITY CHARTER.

*See* STATUTE OF FRAUDS, 6.

## CITY ORDINANCE.

*See* LEASE, 2, 3, 8, 9.

## CLEARING-HOUSE.

*See* NOTES AND BILLS, 1 to 8.

## CODICILS.

*See* LEGACY, 2.  
WILL, 3.

## COERCION.

*See* NOTES AND BILLS, 4, 6.

## COLLATERALS.

*See* PLEDGE, 1 to 5.

## COLLATERAL UNDERTAKING.

*See* ACCOUNT, 1.

## COLLUSION.

*See* EXECUTORS AND ADMINISTRATORS, 19.

## COMMISSIONERS OF HIGHWAYS.

*See* HIGHWAYS, 1, 2.

## COMMISSIONERS TO SUBSCRIBE FOR STOCK IN RAILROADS

*See* TOWN RAILROAD COMMISSIONERS.

## COMMON CARRIER.

*See* NEGLIGENCE, 3 to 7.  
RAILROAD COMPANY.

## COMMON COUNCILMAN.

*See* CONTRACT, 1, 2, 3.

## COMPLAINT.

*See* APPEAL, 1.  
PARTITION, 1.  
SUMMONS, 1.

## COMPOS MENTIS.

*See* WILL, 1, 2, 3.

## CONCLUSION OF LAW.

*See* PLEADING, 2.

## CONDITION PRECEDENT.

*See* COSTS, 4.  
TRUSTS AND TRUSTEES, 1.

## CONDITION SUBSEQUENT.

*See* TRUSTS AND TRUSTEES, 1, 2.

CONSEQUENTIAL DAMAGE.

*See* LEASE, 1.

CONSIDERATION.

1. The execution and delivery of a mortgage in payment of a note is a sufficient consideration to support an agreement to discharge the note. *Caryl v. Williams.* 416
2. An assignment of the mortgage, so received, transfers the title to the mortgage debt. *Id.*
3. Where the mortgage was given by a married woman on her separate estate in payment of her husband's note,—*Held*, that it was admissible to show the consideration of the note to have been money borrowed for her, and employed in improving the mortgaged property. *Id.*

*See* EVIDENCE, 28.  
PRACTICE, 8.  
PRINCIPAL AND AGENT, 1.  
RECEIVER, 6.  
RECORDING ACT, 1, 2.

CONSOLIDATION.

*See* TOWN RAILROAD COMMISSIONERS, 8.

CONSPIRACY.

*See* EVIDENCE, 1.

CONSTITUTIONAL LAW.

*See* MUNICIPAL CORPORATION, 3, 4.  
NEW YORK CITY AND COUNTY, 1, 4.

CONSTRUCTION OF AGREEMENT.

*See* EVIDENCE, 13 to 16.  
PARTNERSHIP, 1.  
WAY.

CONSTRUCTION OF DEED.

*See* DEED, 1.  
WAY, 1 to 9.

CONSTRUCTION OF DEVISE.

*See* DEVISE.

CONSTRUCTION OF STATUTE.

*See* STATUTES CONSTRUED.

CONSTRUCTION OF WILL.

*See* DEVISE.  
EXECUTORS AND ADMINISTRATORS, 21, 22.

CONSTRUCTIVE NOTICE.

*See* MORTGAGE, 1.

CONTRACT.

1. The rule is well settled that no recovery can be had upon a contract entered into in contravention of the terms and policy of a statute. *Smith v. City of Albany.* 14
2. Accordingly the statutes (Sess. Laws 1848, chap. 57, §§ 1, 2, 8), enacting that "it shall not be lawful for a member of the common council of any city in this State \* \* \* to become a contractor under any contract authorized by the common council, &c., \* \* \* of which he is a member, or be in any manner interested directly or indirectly, either as principal or surety, in such contract," and providing that "contracts in violation of the above provisions may be declared void at the instance of the city \* \* \* or of any other party interested in such contract."

*Held*, that plaintiff, a livery-stable keeper, could not recover from the defendant for carriages, &c., furnished by him while an alderman of the city, upon the order of a committee appointed by the common council to make arrangements for the celebration of the Fourth of July. *Id.*

3. The defendants might either bring an action to have the contract declared void, or set up its invalidity in an action brought to recover upon it. *Id.*

4. On a contract for sale and shipment of coal for cash, to be paid on receipt of bill of lading, the defendant shipped the coal and sent the bill of lading to and requested payment of the plaintiff, who claimed an offset and offered the balance, which being refused, he offered his check for the full amount; it being after bank hours this was also refused, and next day he tendered the cash. *Held*, that the plaintiff was in default, and the defendant discharged from the contract. *Bass v. White.* 171

5. Otherwise, if plaintiff had asked time to obtain funds for his check; in such case he should have had a reasonable time. *Id.*

6. A contract for sale of goods provided for payment by note, payable in sixty days. *Held*, that by a delivery of the goods without receipt of the note the terms of the contract were not changed, and that the vendor on demand of the notes and a refusal could maintain an action for immediate payment. *Smith v. Milliken.* 386

*See* ACCORD AND SATISFACTION, 1.  
AGRICULTURAL SOCIETY, 3, 4.  
CONTRACT FOR SALE OF REAL ESTATE.  
CORPORATION, 1 to 12.  
EVIDENCE, 13 to 16.  
HUSBAND AND WIFE, 1 to 4.  
INSURANCE, 1 to 7.  
MARRIED WOMEN, 1 to 4.  
PARTNERSHIP, 1 to 6, 8, 9.  
RAILROAD COMPANY, 1, 2, 3.  
SHERIFF, 5.  
STATUTE OF FRAUDS, 1 to 7.

## CONTRACT FOR SALE OF REAL ESTATE.

1. A contract for the sale of real estate provided that the vendor would procure a search of record showing title free of all incumbrances by the day appointed for delivery of the deed. The defendant went into possession under the contract, and afterward an abstract was furnished showing the title to be incumbered by a mortgage. After receipt of the abstract the vendee kept possession of the premises. *Held*, that the vendee might have rescinded upon receipt of the abstract, but, in order to do so, it was necessary to surrender possession; and that having retained possession and neglected to rescind, he could not avail himself of the breach of the covenant to deliver the search as a defence to an action for specific performance, if the vendor was able at the trial to make such a title as the vendee was entitled to under his contract. *Coray v. Mathewson.* 80

2. The court will not compel a purchaser to take a title which is *prima facie* defective, and which he may not be able to sustain in an action brought to annul it. *Id.*

3. Nor is a contract to give a good title of record satisfied by a title that can only be established by a resort to evidence *aliunde* the record. *Id.*

4. *Held*, accordingly, that a specific performance should not be decreed, it not appearing that the inchoate right of dower of the wife of one of the vendor's predecessors in title had been conveyed to A., under whom the vendor claimed, except by the statement of A. as a witness, that, according to the best of her recollection, the wife of the vendor's predecessor had joined in the deed to A., such deed being lost and not on record. *Id.*

5. *Held*, also, that the fact of the vendee's having gone into possession under the contract, it not appearing whether before or after the

discovery of the defect in the title, and having remained in possession and not rescinded after discovery of the defect, did not amount to a waiver by the vendee of the right to object on account of it. *Id.*

6. A map prepared by defendant and produced at an auction sale of lots in New York city, of which he was the owner, represented a strip of land at One Hundred and Thirty-fifth street, and the auctioneer sold lots as laid out on the strip, and a boulevard shown by the map, which crossed it, stating that they were corner lots. *Held*, that plaintiff, who purchased the lots at the sale, and who before bidding had seen the map, was entitled to all which he might properly have understood from the map and auctioneer's language, viz., to a conveyance describing the lots as being bounded by One Hundred and Thirty-fifth street, and that a conveyance stating that they were bounded by "the line of a certain strip of land designated and laid out as One Hundred and Thirty-fifth street on the map or plan of the city of New York" was not in compliance with the contract of sale. *Phillips v. Hygiene*. 814
7. *Held*, also, that evidence offered by defendant in an action for specific performance to prove what he intended to sell was properly rejected. *Id.*
- See* PRINCIPAL AND AGENT, 3.  
REAL ESTATE BROKERS, 1, 2.

#### CONTRIBUTORY NEGLIGENCE.

*See* NEGLIGENCE, 1, 2.

#### CONVERSION.

*See* ACTION, 4.  
PLEDGE, 1.  
TENANTS IN COMMON, 1 to 7.

#### CONVEYANCE.

*See* ACKNOWLEDGMENT, 1, 2.  
DURESS, 1, 2, 3.  
EASEMENT 1 to 5.  
EQUITABLE RELIEF, 1, 2.  
EVIDENCE, 16.  
JUDGMENT CREDITOR, 1.  
RECORDING ACT, 1, 2, 3.

#### COPY.

*See* REDEMPTION FROM EXECUTION SALE.

#### CORPORATE EXECUTION OF CONTRACT.

*See* CORPORATION, 1 to 6.

#### CORPORATE LIABILITY.

*See* EVIDENCE, 8 to 12.  
STOCK CERTIFICATE, 2, 3, 4.

#### CORPORATE PROPERTY.

*See* LEGACY, 1, 2.  
TRUSTS AND TRUSTEES, 7.

#### CORPORATION.

1. If a committee of three directors has discretionary power for the execution and delivery of a lease of the corporate property, two of the members may seal it with the corporate seal, where the third is absent, but has approved its terms and concurred with the others in directing its engrossment for execution. *So held*, one of the members executing being president of the corporation and custodian of its seal. *President of Union Bridge Co. v. Troy and Lansingburgh R. Co.* 240
2. And the signature of the two members and sealing by them is sufficient execution. *Id.*
3. And, it seems, the corporate seal being properly affixed, no signa

- ture was necessary to the valid execution of the corporate lease. *Id.*
4. Where the resolution appointing the committee provided for a lease for a certain term of years, and the lease, as executed, was for an indefinite time, *held*, that the company afterward ratified the lease, as executed, by suffering the lessee to act upon it to its damage, by the receipt of rent and other acts recognizing its existence. *Id.*
  5. A contract made by a corporation in violation of the terms of its charter is *ultra vires*, and void as against public policy. *Id.*
  6. Corporations may invoke the aid of the court to relieve them from their illegal contracts in like manner as individuals. *Id.*
  7. In general, where parties contracting illegally are *in pari delicto*, courts of equity will not interfere to grant relief to either. But where the agreement is against public policy, the fact that the relief is asked by a party who is *particeps criminis* is not, in equity, material, because the public interest requires that relief should be given, and it is given, to the public through the party. *Id.*
  8. Accordingly *held*, that a contract, *a. g.*, a lease made by a railroad company for the purpose of extending its road beyond the *terminus* fixed by its charter, was *ultra vires*, and void as against public policy, and should be set aside by the courts on the application of one of the parties. *Id.*
  9. But, *held*, the court would not relieve the parties further than the public interest required, and, therefore, that no recovery could be permitted for the use of the property leased, previous to its being declared invalid. *Id.*
  10. An agreement made by one of the trustees of a corporation that if A. will obtain an appropriation for it from the legislature he shall receive whatever amount may be appropriated in excess of a certain sum, was subsequently ratified by the board of trustees, who were cognizant of the agreement, by the appropriation of the excess over the sum named in the payment of A., after he had obtained the legislative appropriation and the payment of the moneys to A. pursuant to the resolution,—*Held*, that these acts were such an abuse of powers of the corporation as to constitute sufficient cause for its dissolution. *People v. Dispensary and Hospital Society, &c.* 304
  11. An answer to a complaint asking such relief and alleging the above facts, which does not deny them, but sets up merely that the trustees acted upon the advice of their counsel in making the payment, and that the board of trustees has been changed since the passage of the resolution by the election of new members, and that the present board is competent to manage the affairs of the corporation, is frivolous. *Id.*
  12. The act of 1865 (chap. 368), which authorizes incorporations for "social, gymnastic, esthetic, musical, yachting, hunting, fishing, bathing or lawful sporting purposes," does not allow incorporations for the purpose of instituting actions to recover penalties for violations of the game laws. *Ancient City Sportsman's Club v. Miller.* 413
  13. So far as a certificate of incorporation under the act expresses such an object, it is unauthorized and void. *Id.*
  14. The authority given to the corporation by the act, to sue and be sued, is subject to the qualification that it is in relation to some matter within the scope of the statute and legitimate purpose of the organization. *Id.*
  15. The statute (chap. 721, L. 1871), under which certain penalties may be recovered by any person in his own name, &c., does not confer the power to prosecute for them upon corporations. *Id.*
- See* AGRICULTURAL SOCIETY.  
EVIDENCE, 8 to 12.  
LEGACY, 1, 2.

*See* MASTER AND SERVANT, 1, 2.  
PARTNERSHIP, 8, 9.  
STOCK CERTIFICATE, 1 to 5.  
TRUSTS AND TRUSTEES, 7.

**COSTS.**

1. In a difficult and extraordinary case, after issue and before trial, it having been twice on the calendar and prepared by defendant for trial, an order was entered, on motion of plaintiff, discontinuing, "on payment of defendant's costs to be taxed, and of an extra allowance herein which may hereafter be made or granted to defendant." *Folsom v. Van Wagner.* 309
2. *Held*, that defendant was entitled to judgment and an extra allowance, in addition to taxable costs, under section 309 of the Code. *Id.*
3. *Held*, also, that there was a "recovery of judgment" by defendant, within the meaning of section 303 of the Code. *Id.*
4. It seems a recovery of judgment is not necessarily a condition precedent to allowance of costs. *Id.*

*See* PRACTICE, 1, 2, 3.

**COUNTER-CLAIM.**

*See* LEASE, 8, 9.  
PLEADING, 1.

**COUNTY JUDGE.**

*See* JURISDICTION, 1, 2, 3.

**COVENANTS.**

*See* LEASE, 4 to 8.  
RECEIVER, 1 to 7.

**CREDIT.**

*See* ACCOUNT, 1.  
EVIDENCE, 20 to 27.  
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**CREDITOR.**

*See* EXECUTORS AND ADMINISTRATORS, 18 to 23.  
JUDGMENT CREDITOR.  
REDEMPTION FROM EXECUTION SALE.

**CREDITOR'S BILL.**

*See* EVIDENCE, 16.  
EXECUTORS AND ADMINISTRATORS, 18 to 23.  
EXEMPT PROPERTY, 1.  
JUDGMENT CREDITOR, 1.

**CRIMINAL LAW.**

*See* LARCENY, 1 to 6.

**CRIMINAL TRIAL.**

*See* LARCENY, 1 to 6.

**CUSTOM.**

*See* AGRICULTURAL SOCIETY, 6.  
EVIDENCE, 26.

**DAMAGES.**

1. In an action of trespass for damage done by cattle, with a claim for taking the cattle from plaintiff's possession after he had them in custody, as permitted by chapter 489, Laws of 1862,—*Held*, error to charge that the jury might allow as damages (if they found for the plaintiff), besides the injury to crops, &c., fifty cents per head for the animals retaken. *Hickok v. Thurstin.* 421
2. The statute allows the sum provided for therein as compensation for the taking and also for pursuing the remedy under it. *Id.*
3. The right to the penalty is not complete until sale of the cattle. *Id.*

4. Accordingly it was error to assume that the plaintiff would have proceeded and the defendant would have appeared, &c. *Id.*

*See* HUSBAND AND WIFE, 3.  
LEASE, 1 to 4, 8, 9.  
NEGLIGENCE, 4, 6, 7.

#### DAMAGE, FEASANT.

*See* DAMAGES, 1 to 5.

#### DEBTOR AND CREDITOR.

*See* JUDGMENT CREDITOR, 1.  
EVIDENCE, 16.

#### DECISION.

*See* PRACTICE, 8.

#### DECLARATIONS.

*See* EVIDENCE, 1, 2, 12, 16, 29 to 32.

#### DECREE.

*See* JUDGMENT CREDITOR, 1.  
PARTITION, 5.  
WILL, 2.

#### DEED.

Separate deeds to different grantees, from the same grantor, will not be construed together in determining rights of the grantees in relation to a common subject-matter. *Rexford v. Marquis.* 249

*See* ACKNOWLEDGMENT, 1, 2.  
CORPORATION, 1 to 6.  
EQUITABLE RELIEF, 1, 2.  
ESTOPPEL, 2, 8.  
EVIDENCE, 2, 4, 5, 16.  
JUDGMENT CREDITOR, 1.  
MORTGAGE, 1.  
PRACTICE, 7.  
RECORDING ACT, 2, 8.

*See* PRINCIPAL AND AGENT.  
TRUSTS AND TRUSTEES, 1 to 4.  
WAY, 1 to 2.

#### DEER.

*See* GAME LAWS, 1.

#### DEFAULT.

*See* CONTRACT, 4, 5.

#### DEFECTIVE TITLE.

*See* MORTGAGE FORECLOSURE, 1 to 6.

#### DEFENCE.

*See* CONTRACT FOR SALE OF REAL ESTATE, 2, 5.  
INSURANCE, 6.  
LEASE, 1, 2, 8, 9.  
PARTNERSHIP, 12.  
SUPPLEMENTARY PROCEEDINGS, 3, 4.

#### DELIVERY.

*See* GIFT, 4, 5.  
RAILROAD COMPANY, 2.  
STATUTE OF FRAUDS, 7.

#### DEMAND.

*See* CONTRACT, 6.  
LEASE, 10.  
TENANTS IN COMMON, 4.

#### DEMURRER.

*See* PARTITION, 2.

#### DESCRIPTION.

*See* MORTGAGE, 1.



DEVISE.

1. Devise to tenant for life, remainder over to testator's two children; if one died without issue, survivor to take the whole. *Held*, that each child took a vested remainder in fee, subject to be divested by his death without issue. *Howell v. Mills*. 198
2. A devise to testator's son J. for life, and, "if he leaves no legitimate heirs," then to testator's son D., is, *it seems*, by implication, a devise to the legitimate heirs of J., if any. *Prindle v. Beveridge*. 225
3. *Held*, also, that by "legitimate heirs" were meant *children* of J. or their descendants, and not the heirs general of J. *Id*.
4. *Also*, the devise being in 1828, that an estate-tail, determinable on the indefinite failure of issue of J., was not intended, but the devise was to the children of J. or their descendants living at the death of J. *Id*.
5. *Also*, that the devise over to D. was good as an executory devise. *Id*.
6. Where a testator devised his real estate and directed the devisees to pay certain legacies, and, without any other bequests, directed all his debts, liabilities and funeral expenses to be paid out of his personal estate, and the rest and residue, "not specifically devised and bequeathed," to be divided among his daughters and sons, it seems that there was a gift of all the personal, after payment of debts, liabilities and funeral expenses, to the children. *Salisbury v. Morse*. 859
7. *And, held*, that a direction to a devisee to pay one of the legacies to the executors, partly within a year, showed a design to charge the estate devised to him, to the relief of the personalty. *Id*.
8. And that this was so in view of other provisions of the will, although the testator distinctly charged an annuity for his widow upon real estate devised to certain other devisees. *Id*.
9. A testator gave all his real and personal estate to his "trustees and executors" named in his will, on condition that they should dispose of it as thereafter directed, then made a devise of real estate to his wife, subject in part to a power of sale in his executors, and gave her an annuity for maintenance of herself and children, payable by his executors out of the rents of specified real estate, or, on deficiency of such rents, from the interest of other designated property. The remaining dispositions of the will were in the form of pecuniary legacies, and the residue was not disposed of. *Held*, that the executors took only a power in trust in the real estate, and the lands to which it related descended to those otherwise entitled, subject to the execution of the trust as a power. *Vernon v. Vernon*. 493
10. *Held*, also, that the trust was valid as to the personal estate. *Id*.
11. And that the residuum, after fulfillment of the specific directions of the will, resulted to the heirs or next of kin in its original character. *Id*.
12. *Held*, also, no intention to put the widow to her election appearing from the expressions of the will, that her right of dower and distributive share in the personal estate were not repugnant to the will, and that she was entitled thereto in addition to other provisions for her benefit. *Id*.
13. *Also*, that the intent to pass a life estate to the widow in lands devised to her was manifest from directions to the executors to invest the proceeds of a sale thereof, which they were empowered to make for her benefit during life. *Id*.
14. The will also provided that the balance of capital due the testator in a firm of which he was member might remain with the surviving partners for a certain time at interest. *Held*, that the executors

were barred during that time from recovering the same, and that security could not be required by the court in a suit to which one of the surviving partners was not a party. *Id.*

*See* PURCHASER PENDENTE LITE, 1, 2, 3.

EXECUTORS AND ADMINISTRATORS, 8 to 11.

#### DIRECTORY STATUTE.

*See* CANAL BOARD, 1.  
EXECUTORS AND ADMINISTRATORS, 16.

#### DISCHARGE.

*See* ACCORD AND SATISFACTION, 1.  
PRINCIPAL AND AGENT, 1, 2.

#### DISCONTINUANCE.

*See* COSTS, 1, 2.  
PRACTICE, 1, 2, 3.

#### DISCRETION.

*See* PRACTICE, 12.

#### DISSOLUTION OF CORPORATION.

*See* CORPORATION, 10, 11.

#### DISTRIBUTIVE SHARE.

*See* DEVISE, 12.

#### DITCHES.

*See* EASEMENT, 1 to 5.

#### DIVIDENDS.

*See* STOCK CERTIFICATE, 4.

#### DIVORCE.

*See* ALIMONY.

#### DONOR AND DONEE.

*See* GIFT.

#### DOWER.

*See* DEVISE, 12.

#### DRAFT.

*See* NOTES AND BILLS, 1 to 8.

#### DRAIN.

*See* HIGHWAYS, 1, 2.

#### DURESS.

1. In order to authorize a court to declare a wife's conveyance invalid on the ground that its execution was procured by duress of her husband, the evidence of duress should be strong and clear. *Reesford v. Reesford.* 6

2. If declarations made by the husband to the wife are relied upon to prove such duress, they should be of such a character as to establish, beyond any question, that she acted under an apprehension of personal injury or grievous wrong. *Id.*

3. *Held*, accordingly, that threats made by a husband to his wife some time prior to her signing a deed by which her inchoate right of dower was conveyed to a third person, that if she did not sign the deed she should not live with him in peace, were not sufficient to invalidate her deed. *Id.*

#### EASEMENT.

1. The right to enter upon the servient estate for the purpose of re

pairing a structure to which it is subject as an easement, attaches to the dominant estate. *Roberts v. Roberts.* 55

2. So *held*, where, by conveyance of a part of a tract of land, openly and visibly benefited by a ditch on the remainder, an easement in the ditch passed to the grantee. *Id.*
3. It seems, however, that the burden imposed cannot be made greater than it was at the time of the conveyance. *Id.*
4. Planking and erections put up on the servient estate with consent and assistance of the servient owner, to prevent escape of water from the ditch upon the dominant estate, will not, in the absence of proof, be assumed to increase the flow of water on to the servient estate in an action to restrain the servient owner from removing them; nor are the planks and erections presumptively more injurious than the ditch at the time of the grant. *Id.*

*See* WAY.

### EJECTMENT.

*See* REDEMPTION FROM EXECUTION SALE, 1.

### ELECTION.

1. Where the certificate of inspectors of election shows fewer votes canvassed than appear by the poll list to have been cast, and the proof is that two of three candidates (who have all the votes canvassed) received respectively more votes than the certificate gives them, and there is evidence tending to show fraud,—*Held*, that the remaining votes appearing on the poll list, which is unquestioned, although less than returned for the third candidate, should not be counted for him. (*MILLER, P. J., dissenting.*) *People ex rel. Judson v. Thacher.* 274

2. Accordingly where it appeared, in an action brought to try the title to the office of mayor, in the city of Albany, that by the poll list of one of the voting districts there were cast 729 votes for that office; that while the votes were being counted the gas-light went out, and on counting the ballots, after it had been relighted, it was found that there were only 652 ballots for mayor, of which 460 were for T. and the balance for two other candidates, and the inspectors made their return according to this count, and it was also shown by oral proof that 334 voters had voted for the candidates, other than T.,—*Held*, that it was error to charge the jury that the number of votes proved to have been cast for the candidates, other than T., should be deducted from the larger number of votes cast at the poll, and not from the smaller number of votes canvassed. *Id.*

3. The court might, *it seems*, if there were evidence on the subject, have submitted to the jury the question, whether the seventy-seven votes were cast for T.; and instructed them that, if they found they were, they should deduct the number found to have been given for the other candidates from the whole number of votes cast. (*Per PARKER, J.*) *Id.*

4. *Held*, also, that the return might be rejected, without respect to the question whether the inspectors had been concerned in the fraud. *Id.*

5. And accordingly, if, during the interval between the going out of the gas and its being relighted, ballots had been taken from the table and others substituted by persons other than the inspectors and without their complicity, and it was entirely uncertain to what extent this had been done, it would be sufficient cause for setting aside the return; and there being evidence tending to show this, it was error to refuse to charge to this effect. (*MILLER, P. J., dissenting.*) *Id.*

6. *Held*, error, also, to charge that the jury must be convinced "that there was intentional fraud on the part of the inspectors, and such fraud as altered the result in order to set aside the return." *Id.*

2. *It seems* there would be no equitable conversion in such case, even if the executor were directed to sell the real estate. *Id.*

*See* EXECUTORS AND ADMINISTRATORS, 21, 22.

## ELECTION RETURNS.

*See* ELECTION.

## EMPLOYER AND EMPLOYEE.

*See* MASTER AND SERVANT.

## ENTRIES.

*See* ACCOUNT, 1, 2, 3.  
EVIDENCE, 20 to 27.

## ENTRY OF ORDER.

*See* PRACTICE, 9.

## EQUITABLE ACTION.

*See* PURCHASER PENDENTE LITE, 2, 3.

STATUTE OF LIMITATIONS, 8.  
EXECUTORS AND ADMINISTRATORS, 9, 10, 18 to 23.

## EQUITABLE CONVERSION.

1. The only purposes to which a power of sale, to the executor, contained in a will could be applicable, being the payment of debts and legacies and to carry into effect a devise to him of the real estate in trust, the doctrine of equitable conversion of the real into personal is not applicable where the personal estate is sufficient for the payment of the debts, &c., and the devise has been declared invalid. The rule *cessante ratione legis cessat ipsa* applies in such case. *McCarty v. Terry.* 236

## EQUITABLE DEFENCE.

*See* EXECUTORS AND ADMINISTRATORS, 7.  
PLEADING, 1.

## EQUITABLE OWNERSHIP.

*See* INSURANCE, 1.

## EQUITABLE PROOF.

*See* EVIDENCE, 4.

## EQUITABLE RELIEF.

1. There is, it seems, no superior equity in favor of a grantor, whose deed is voidable for duress, against the purchaser for value, without notice. *Rexford v. Rexford.* 6

2. A legal title of one who takes without notice of a prior equity, must, it seems, prevail over such equity. *Id.*

3. A right to use the waters of a well, as owner of land on which it stands, must be asserted at law; but where it is sought to restrain interference with the enjoyment of an easement to use a well on another's land, the action is equitable. *Applegate v. Morse.* 59

*See* CORPORATION, 6 to 10.  
EXECUTORS AND ADMINISTRATORS, 9, 10.  
PRACTICE, 12.  
PURCHASER PENDENTE LITE, 1, 2, 3.  
STATUTES OF LIMITATION, 1, 2, 3.  
TRADE-MARK, 6.

ESTATE-TAIL.

*See* DEVISE, 4.

ESTOPPEL.

1. A recital in a mortgage that the premises are the same this day conveyed by the mortgagee to the mortgagor estops the mortgagee, *it seems*, and his heirs from denying the conveyance of the premises. *Corey v. Matthewson.* 80
2. Taking a quitclaim deed from one, claiming as tenant for life under a will, does not estop the grantee, or his assigns, from disputing the title of those claiming as remainder-men after the decease of the tenant for life. *Prindle v. Beveridge.* 225
3. Nor does a reference to the will, by the deed, for a description of the premises. *Id.*

*See* CORPORATION, 4.  
NOTES AND BILLS, 8.  
PARTNERSHIP, 6, 7.

EVICTIION.

*See* LEASE, 1 to 10.

EVIDENCE.

1. Where the answer averred that the note in suit had been obtained through conspiracy to extort money, of which the plaintiff had knowledge,—*Held*, that there was no charge that plaintiff had been concerned in the conspiracy, and the declarations of the conspirators were not evidence against him. *Osborn v. Robbins.* 44
2. Declarations of a former holder of a note are not competent evidence against any person deriving title from him. *Id.*
3. It is competent in equity to prove by parol that a deed, absolute on its face, was intended as a secu-

rity for a loan, and without regard to the question whether it was given through fraud or mistake. *Brown v. Clifford.* 43

4. On the trial of a feigned issue to determine if an absolute deed was intended as a mortgage, the rules in equity govern the admission of evidence. *Id.*
5. Whether a deed absolute was intended as a mortgage is a mixed question of law and fact. *Id.*
6. If the county judge issues an attachment for disobedience to his order under § 294, it is presumed to have been issued on proper proof of the fact. *Miller v. Adams.* 131
7. And in an action of false imprisonment upon arrest under such an attachment, where the county judge testified that he could not remember the nature of the proof but thought proper proof had been made,—*Held*, that the *onus* remained with the plaintiff to prove the negative. *Id.*
8. A judgment against a corporation is evidence of its indebtedness in an action to enforce the corporate liability against a stockholder. *Hall v. Siegel.* 206
9. *Allen v. White* (57 Barb., 504) reaffirmed. *Id.*
10. The trustees of a corporation for social and recreative purposes, under the act of 1865, chap. 868, are liable for its debts as therein provided (§ 7), upon condition that a suit to enforce such liability shall be brought within a year. *Id.*
11. Accordingly *held*, that a judgment recovered against the corporation, within a year from the time when the debt (payable within a year from the time when it had been contracted) had become due and payable, was not evidence of a stockholder's liability in an action brought against him after the year had expired. *Id.*
12. The place of birth cannot be proved by hearsay, *e. g.*, by decla-

- rations of parents, although, it seems, pedigree may be. *McCarty v. Terry*. 236
18. The purpose of a written agreement is to record, with precision, the mutual understanding of the parties. When the terms of it are free from ambiguity, everything *dehors* the writing is excluded, and all matters of negotiation and discussion on the subject are merged in the instrument. *Clark v. New York Life Insurance and Trust Co.* 322
14. Unless there be such an ambiguity in the terms of the contract as to require extrinsic evidence to remove or explain it, such evidence is inadmissible, or, if admitted, does not control the construction of the agreement. *Id.*
15. Accordingly, where an agreement recited that the contracting parties were, respectively, owners of lots on the northerly and southerly sides of Twenty-second street, between Fourth avenue and Broadway, and made certain agreements respecting "the lots *fronting* said street,"—*Held*, the plain intent of the parties was to include in the agreement all their property on Twenty-second street, between Broadway and Fourth avenue; and that a map shown to have been before the parties at the execution of the agreement, upon which certain of the lots lying on the corner of Broadway and Fourth avenue were laid down as *fronting* on Broadway, could not control or interfere with this intention. *Id.*
16. The declarations of a grantor, made after the conveyance, are not evidence to charge the grantee with a fraudulent intent in taking the conveyance. *Orr v. Gilmore*. 345
17. The recital, in a sheriff's deed of real property sold under execution, of the issuing of the execution, is not, *if seems*, sufficient proof of that fact in favor of the purchaser. *Phillips v. Schiffer*. 347
18. But where the sheriff also testified that the writ was issued and delivered to him, and that he made the sale under it, and produced his register, in which official entries had been made by him of the issuing of the writ contemporaneously with its issue, some forty years previously, and there had been uninterrupted occupation under his deed for nearly the same time,—*Held*, the proof was sufficient to sustain a finding of the issuing of the writ. *Id.*
19. Parol evidence that one of two joint makers of a note signed as surety is not competent. *Campbell v. Tuttle*. 370
20. Books of original entry, and also books of entries transcribed from lost books of original entry, are admissible in evidence as memoranda of witnesses who testify to delivery of the items of the account. *Green v. Disbrow*. 381
21. A bill of items, proved to have been copied from the entries, is admissible, at least, to show what charges were actually made. *Id.*
22. Charges in books and accounts, proved by the plaintiff and his clerks, are competent, although other items in the same account are not proved. *Id.*
23. The plaintiff proved a book account charged against A., but the credit was intended to be given to B., and the charge so made at his request and for his convenience. *Held*, that the undertaking of B. was not collateral, but the credit was wholly to him. *Id.*
24. *Held*, also, in an action on the account against B., that the plaintiff might prove that A. had no property, as bearing upon the improbability that plaintiff would give him credit for any large amount. *Id.*
25. The contents of a letter from plaintiff to A., applying for payment of the account, which appeared from A.'s cross-examination to have been received, and as to which he then swore he did not

know where it was, but thought it had been destroyed,—*Held*, admissible on re-direct examination. *Id.*

26. *Held*, also, that testimony to show that B. had paid A.'s similar debts was proper on the question of A.'s agency in contracting the account. *Id.*

27. And that plaintiff's custom as to charging interest, communicated to B., and on which he had acted, was also admissible. *Id.*

28. But *held*, also—the demand being almost outlawed and disputed, the circumstances peculiar, and the evidence failing to fix the time when the custom was communicated to B., or in what manner he had conformed to the custom, or how the account was made up, with regard to charges for interest—that interest, before the suit, was improperly allowed. *Id.*

29. In an action upon the warranty of a chattel, brought by an assignee, whose assignment in writing expressed a consideration "for value received," *held*, that evidence of the actual amount paid on the assignment was properly excluded. *Chapin v. Hollister.* 458

30. And it was not error to disallow a cross-examination of the assignor, as to such amount, although he had given testimony as to the value of the chattel as warranted, there being no abuse of discretion in excluding it. *Id.*

31. *Held*, also, that an objection was properly sustained to the cross-examination of the assignor respecting his conversation with the warrantor directly after completion of the sale with warranty, the materiality of the testimony not appearing. *Id.*

32. Nor was it proper to show a conversation between the assignor and assignee, prior to the sale, as to the actual value of the chattel, as tending either to show that there was no warranty, or that he did not rely upon one. *Id.*

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EXEMPT PROPERTY.  
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SHERIFF, 6, 7.  
SUPPLEMENTARY PROCEEDINGS.

## EXECUTORS AND ADMINISTRATORS.

1. Where the will directs the executors and trustees to apply, out of the general income of the estate, a sufficient sum to educate certain minors so long as industrious, &c., and until a certain age, the trustees should determine what sum they will pay annually; and invest a principal sum, out of the estate, sufficient to yield such sum at

interest, after satisfying commissions, debts and funeral expenses.  
*Petrie v. Petrie.* 90

2. A legacy for education, like one for maintenance, is to be preferred to general legacies; and in case of doubt as to a sufficiency of assets to provide for such legacy, the legatee has a right to an accounting and to compel the investment of a sufficient sum to answer the purposes of the bequest. *Id.*

3. The assets of an estate can only be recovered by the personal representative of the deceased; a legatee under a will, as such, has no power to collect assets of the estate from a deceased executor's representatives, nor to restrain the executor, when solvent, from applying the funds of the estate to fictitious or outlawed claims. *Id.*

4. One claiming to restrain an executor from making such payments must show the executor's insolvency; his ignorance on the subject will not throw the *onus* on the executor. *Id.*

5. An executor, having in his hands funds sufficient to pay judgments rendered against testator in his lifetime and applicable to their payment, suffered testator's real estate to be sold under execution issued upon the judgments, and became the purchaser in his own name at the sale. *Prindle v. Beveridge.* 225

6. *Held*, that the purchase was fraudulent as against the devisee of the real estate and those claiming under him, and that the executor and his assigns held only as trustees for them. *Id.*

7. *Held, also*, that a grantee of the devisee might set up this fraud as an equitable defence in an action brought to recover the real estate by one claiming under the executor, and avoid the title equally as if he was proceeding as plaintiff for that purpose. *Id.*

8. Letters testamentary issued on a will, and the executor received at

the same time those of administration upon the estate of a deceased devisee who had become personally liable by acceptance of the devise for a legacy charged on the devised property.—*Held*, that the executor's only action for the legacy was in equity, and he was not barred by the six year's limitation at law. *Salisbury v. Moss.* 359

9. And whether the executor's action would in any case not be for the relief within section 97 of the Code, *quere.* *Id.*

10. *Held, also*, that an action would lie by the executor against the devisees for the amount of the legacy, the same having been recovered of him by the legatee, and the judgment assigned to the executor's attorney. *Id.*

11. It will be assumed, in favor of an administrator's bond, which requires obedience to all orders "of the county judge," that no provision has been made (Const., art. 6, § 15) for a separate surrogate in the county. *Farley v. McConnell.* 428

12. The court will take judicial notice of the population of counties and the public officers therein. *Id.*

13. The administrator's bond is not defective, because the county judge is named in it, in counties where the judge is also surrogate. *Id.*

14. Or, if defective, the intent being manifest, the court will relieve against it. It is sufficient if the bond conform substantially to the statute. *Id.*

15. In the absence of proof it will be assumed that the surrogate made the proper examination as to the manner of the intestate's death; and this is so, although the petition does not affirmatively show that fact. *Id.*

16. The statute which requires the surrogate to examine the applicant for the letters, as to the time, &c.,



of death, is merely directory. (Per MILLER, P. J. *Id.*

17. Letters of administration, being in due form and regular upon their face, confer authority upon the administrator, and are not questionable in a collateral action. *Id.*

18. Under particular circumstances a creditor of an estate of a deceased person may maintain an action to collect his debt from a debtor to the estate. *Fisher v. Hubbell.* 481

19. As in case of collusion between debtor and personal representative, the latter's insolvency, partnership in an indebted firm, or refusal to sue. *Id.*

20. So where the executor, whose estate is indebted, is administrator with the will annexed of the creditor estate, it is an exception to the general rule that the creditor must recover through the personal representative. *Id.*

21. Legatees claiming an equitable conversion of real estate under the will of another decedent in favor of their testator, or a charge of their legacies, by their testator, upon land devised to him by such will, the personal representative of each estate being the same, may bring an action for construction of the wills, an accounting, and payment of their legacies, and may join in one suit as creditors having claims of equal degree and under like circumstances. *Id.*

22. The action seeking to charge the equitable personal estate, the personal representative of the estate to be charged must be a party to it, and in his representative character, it is not sufficient to make him a party, as the representative of the estate through which the legatees claim. *Id.*

*See* ACCOUNTING, 1 to 5.

DEVISE, 7, 8, 9 to 15.

PARTNERSHIP, 4, 5.

PURCHASER PENDENTE LITE.

RECEIVER, 5.

STATUTE OF LIMITATIONS, 4, 5, 6.

## EXECUTORY DEVISE.

*See* DEVISE.

## EXEMPT PROPERTY.

A soldier's bounty money being exempted from execution and proceedings supplementary thereto by statute (chap. 578 of 1864, § 4), the creditors of the soldier cannot interfere with it either in his hands or in the hands of his donee, and he having given it to his wife, and it having been invested by her in the purchase of real estate, the deed cannot be set aside at the instance of the husband's creditors. *Whitney v. Barrett.* 106

## EXPERT.

*See* SURROGATE, 1.

## EXTENSION OF TIME.

*See* RECORDING ACT, 1, 2.

## EXTRA ALLOWANCE.

*See* COSTS, 1 to 5.

## EXTORTION.

*See* EVIDENCE, 1.

## EXTRINSIC EVIDENCE.

*See* EVIDENCE, 13 to 16.

## FAIR GROUNDS.

*See* AGRICULTURAL SOCIETY.

## FALSE IMPRISONMENT.

*See* EVIDENCE, 6, 7.

## FEDERAL COURTS.

*See* MUNICIPAL CORPORATION, 8, 4.

## FEIGNED ISSUE.

*See* EVIDENCE, 4.  
PRACTICE, 4 to 8.  
SURROGATE, 1.  
WILL.

## FINDING.

It may be assumed, in order to sustain a judgment rendered upon the report of a referee, that a finding of fact was sustained by evidence given upon the trial, although such evidence does not appear in the case on appeal. *Tryon v. Baker*. 511

*See* PARTNERSHIP, 7, 8.  
PRACTICE, 4 to 8.  
PRESCRIPTION, 1.

## FIRE INSURANCE.

*See* INSURANCE.

## FORECLOSURE.

*See* MORTGAGE FORECLOSURE.

## FORGED BILL OR CHECK.

*See* NOTES AND BILLS, 1 to 9.

## FRAUD.

*See* ELECTION, 1 to 7.  
EVIDENCE, 3.  
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PRINCIPAL AND AGENT, 3.  
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WILL, 2.

## FRAUDS, STATUTE OF.

*See* STATUTE OF FRAUDS.

## FRAUDULENT INTENT.

*See* EVIDENCE, 16.  
JUDGMENT CREDITOR, 1.

## FRAUDULENT REPRESENTATIONS.

*See* HUSBAND AND WIFE, 1, 3.

## FRIVOLOUS ANSWER.

*See* CORPORATION, 11.

## GAME LAWS.

Where one offers for sale, or has in his possession, the green skin or fresh carcass of a deer, killed in violation of chap. 898, L. 1867, he is liable for the penalty, although his title and possession were acquired by purchase at sheriff's sale on execution against the property of the killer. *Bellows v. Elmen-dorf*. 462

*See* CORPORATION, 12 to 16.

## GENERAL TERM.

*See* APPEAL, 1.

## GIFT.

1. Where the owner of personal property makes a verbal gift of it the donee acquires a perfect title, if he obtains possession of the property before revocation of the gift by the donor, although it was not present or even *in esse* when the gift was made. (Per MULLIN, P. J.) *Whiting v. Barrett*. 106
2. The consent of the donor that the donee shall take the property as owner must be presumed, unless revoked, until possession is obtained. 14

3. A recognition of the donee's ownership, by the donor, of property not present or *in case* at the time of the gift, after the former has taken possession, renders the gift a perfect one, and completely transfers the title. *Id.*

4. Where the owner of two heifers (at her residence on the premises where the heifers were) told the plaintiff, her daughter, that she might have whichever one of them she wanted, the cattle not being present, the plaintiff not living with her mother and no other possession or delivery made,—*Held*, that there was no delivery or acceptance constituting a valid gift. *Brink v. Gould.* 425

5. Nor was the intended gift rendered valid by the subsequent joint occupation and management of a farm upon which the cattle were pastured with other stock for their common benefit. *Id.*

GOODS SOLD.

*See* ACCOUNT, 1, 2, 3.

GRAND LARCENY.

*See* LARCENY, 1 to 6.

GRANTOR AND GRANTEE.

*See* JUDGMENT CREDITOR, 1.  
EVIDENCE, 16, 17, 18.  
SHERIFF, 6, 7.  
TRUSTS AND TRUSTEES, 1 to 4.

HARBORS.

*See* MUNICIPAL CORPORATION, 1 to 5.

HIGHWAY COMMISSIONERS.

*See* HIGHWAYS.  
VILLAGES, 3, 4, 5.

HIGHWAYS.

1. Commissioners of highways changed the course of a sluiceway crossing and draining a highway, and threw the water upon the defendant's land. The defendant obstructed the sluice and was sued for a penalty. *Held*, that if the effect of the change was to destroy his cultivated fields, the defendant might peaceably abate the sluice in that manner as a nuisance. *Thompson v. Allen.* 459

2. The plaintiff's remedy was not confined to an action against the commissioners for improper, malicious, &c., acts, but he might prove such injuries in defence to the action. *Id.*

*See* VILLAGES, 1 to 6.

HOLLAND GIN.

*See* TRADE-MARK, 2.

HOMESTEAD EXEMPTION ACT.

*See* REDEMPTION FROM EXECUTION SALE, 14.

HUSBAND AND WIFE.

1. The plaintiff was induced by fraudulent representations to make a contract to exchange his land for other land, and a mortgage, of little value compared with amount secured, at its face. On the day for consummating the contract it appeared that the wife of the defrauder held the mortgage as assignee, though evidence was given to show that she held it for her husband's benefit. The wife was present and the plaintiff's deed was made, by her suggestion, to her. She executed the assignment, joined in her husband's conveyance, and the plaintiff gave notes to her order for interest due on liens on the land conveyed to her by him. *Held*, that the evi-

dence warranted a verdict against the wife for damages as an active party to the fraud. *Vanneman v. Powers*. 181

2. A tender of reconveyance to the plaintiff, without offer of the notes, *held*, not a rescission of the contract, although made after receipt of a letter from plaintiff reciting the fraud and proposing, in general terms, a settlement. Such a letter was not an overture for rescission of the contract. *Id.*

3. *Held*, further, that the wife was liable in damages under the rule that the representations of an agent are, in law, those of the principal. *Id.*

*See* ACKNOWLEDGMENT, 12.  
DURESS, 1, 2, 3.  
MARRIED WOMEN.  
PARTITION, 7, 8.

#### ILLEGAL ALLOWANCE.

*See* NEW YORK CITY AND COUNTY, 5.

#### ILLEGAL CONTRACT.

*See* CONTRACT, 1, 2, 3.  
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#### IMPLIED ASSENT.

*See* ACKNOWLEDGMENT, 2.

#### IMPLIED COVENANTS.

*See* LEASE, 4 to 8.

#### IMPLIED OBLIGATION.

*See* NEGLIGENCE, 3.

#### IMPOSITION ON COURT.

*See* SUPPLEMENTARY PROCEEDINGS, 1, 2.

#### INCAPACITY.

*See* SURROGATE, 1, 2.

#### INFANT

*See* PARTITION, 5.

#### INJUNCTION.

An injunction will not issue to restrain the disbursement of the plaintiff's portion of a tax, to meet interest on town railroad bonds issued without authority, where the commissioners holding the tax are abundantly able to answer for its loss. *Kilbourne v. Allen*. 353

*See* EQUITABLE RELIEF, 3.  
EXECUTORS AND ADMINISTRATORS, 4.  
PRESCRIPTION, 1.  
TRADE-MARK, 6.

#### INQUIRY.

*See* MORTGAGE, 1.

#### INSPECTORS OF ELECTION.

*See* ELECTION, 1 to 7.

#### INSURANCE.

1. One who has a contract for the purchase of a mortgage, the purchase-money being payable by installments, and who has made part payment under the contract, is, in equity, the owner of the mortgage, and his insurable interest in the property covered by it is the full amount due and to become due

thereupon. *Excelsior Fire Ins. Co. v. Royal Insurance Co.* 188

take, &c. *Wood v. Schenectady Ins. Co.* 453

2. An agent for plaintiff, an insurance company, having made an insurance upon property, was directed by his principal to cancel the policy. He did not do so, but applied to the agents of defendant for reinsurance upon the risk, which they refused, but consented to insure the interest of the owner in the property for the amount insured by plaintiff. The policy issued by defendant to the owner was never delivered to her, but remained in the possession of plaintiff's agent at the time the property was burned. After the fire the owner paid the premium due to defendant and assigned the policy to the plaintiff. The conditions of the policy required that in case of other insurance the defendant should pay *pro rata*. *Held*, that defendant was not liable to plaintiff as reinsurer of the risk, but that plaintiff, as assignee of the owner, could recover a part of the insurance made by the defendant, proportionate to the amount of insurance upon the property. *Id.*

3. Whether, if the plaintiff had purchased the policy of defendant from the insured, not being liable upon the policies issued by it, the purchase would have been valid, *quere*. (Per MULLIN, J.) *Id.*

4. A ratification by the insured of the act of her agent in making the insurance is sufficient if made after a loss has occurred. *Id.*

5. A policy of insurance provided that an application or survey, if referred to therein, should be considered part of the agreement and a warranty. The insured sued for the insurance, after loss had occurred, and asked to have the policy conformed in a single particular to the application, which was not so referred to, and the agreement of which it was the basis, on showing mistake, &c., in that particular. *Held*, that the application was not to be regarded as embodied in the policy, further than necessary to correct the mis-

6. To avail himself of a defence that the application and survey were part of the policy and a warranty, the defendant must set up the defence in his answer. It is not enough that the application is proved on the trial. *Id.*

## INSURANCE POLICY.

*See* INSURANCE, 5, 6.

## INTELLIGENCE.

*See* WILL, 1, 2.

## INTENTION.

*See* EVIDENCE, 15.

## INTEREST.

*See* EVIDENCE, 26, 27.  
TENANTS IN COMMON, 6.

## INTERLOCUTORY ORDER.

*See* ALIMONY, 1, 4.

## JOINDER OF PARTIES.

*See* ACTION, 1, 2, 3.

## JOINT LIABILITY.

*See* PARTNERSHIP, 6, 7.

## JOINT MAKER.

*See* EVIDENCE, 19.

## JOINT PURCHASER.

*See* STATUTE OF FRAUDS, 7.

## JUDGMENT.

- See* ACTION, 3.  
 ALIMONY, 1 to 5.  
 ATTACHMENT, 4, 5.  
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 JUDGMENT CREDITOR.  
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 PRACTICE, 8.  
 PURCHASER PENDENTE LITE, 1.  
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 1.

## JUDGMENT CREDITOR.

A fraudulent intent being established against the vendor and vendee in a conveyance for a valuable consideration, by a judgment creditor of the vendor, he is not entitled to judgment setting aside and annulling the conveyance, but only that the property be sold and his judgment paid out of the proceeds.  
*Orr v. Gilmore.* 345

*See* REDEMPTION FROM EXECUTION SALE.

## JUDGMENT DEBTOR.

*See* SUPPLEMENTARY PROCEEDINGS, 1 to 5.

## JUDICIAL NOTICE.

*See* EXECUTORS AND ADMINISTRATORS, 11, 12.

## JUDICIAL SALE.

*See* MORTGAGE FORECLOSURE, 1 to 6.

## JURISDICTION.

1. An order under § 294, Code, requiring one having property of or indebted to a judgment debtor to

appear and answer, &c., is within the jurisdiction of the judge of the county to which execution has issued on the judgment. *Miller v. Adams.* 136

2. An order obtained, on incompetent evidence of jurisdictional facts, from a court of record, or officer acting judicially in determining the question of jurisdiction, is, in the absence of bad faith, protection to the party instituting the proceedings therefor. *Id.*
3. Six propositions, embracing rules of liability of parties in such cases, stated (per MULLIN, P. J.). *Id.*

*See* ATTACHMENT, 1 to 4.  
 CANAL BOARD, 5, 6.  
 MUNICIPAL CORPORATION, 1 to 5.

## JUSTICE OF THE PEACE.

*See* ATTACHMENT, 1 to 4.

## JUSTIFICATION OF SURETIES.

*See* SHERIFF, 1 to 5.

## KNOWLEDGE.

*See* MASTER AND SERVANT, 2.

## LANDLORD AND TENANT.

*See* ATTACHMENT, 6.  
 LEASE.

## LANE.

*See* WAY.

## LARCENY.

1. Upon a trial for larceny from the person, where the proof does not warrant a finding of the value of the property at less than \$35, a re.

fusal to instruct the jury that the offence is petit larceny unless such value shall be found less than \$25 is not error. *Higgins v. The People*. 110

2. Mere proof of the taking of bills of certain denominations, without proof of their genuineness as bills or circulating media, is insufficient to warrant conviction of larceny. *Id.*

3. But it will be assumed on appeal that there was evidence of genuineness upon the trial, if the bill of exceptions does not show that it contains all the evidence given. *Id.*

4. The taking of property from the person less than \$25 in value, and of bills of denominations exceeding in the aggregate that amount, but not shown to be genuine having been proved; *held*, that a request to instruct the jury that there was no evidence of a larceny was properly refused. *Id.*

5. *Held*, further, that a conviction of grand larceny would be sustained on appeal, in the absence of a statement in the bill of exceptions that it contained all the evidence given at the trial. *Id.*

#### LAY WITNESS.

*See* SURROGATE, 1.

#### LEASE.

1. Consequential damage to the demised premises resulting from the lessor's acts not done upon them, and not depriving the tenant of possession of any part of them, is no defence to an action for the rent. *Gallup v. Albany Railway*. 471

2. The defendant, a horse railway company, leased the plaintiff's premises located in a city and on a

public street; on which street, by permission of the municipality and subject to the latter's right to repair, alter, &c., it had placed tracks communicating with the premises. Afterward, under a city ordinance, the grade of the street was changed and the communication removed and rendered impracticable, materially impairing the value of the plaintiff's occupancy. *Held*, that the plaintiff's damages were not a defence to an action for rent. *Id.*

3. *Held*, also, that they did not arise out of the same contract or transaction as the claim for rent. *Id.*

4. Whether covenants in leases may be implied as at common law under the Revised Statutes, *quere*. *Id.*

5. But the covenant for quiet enjoyment is not to be implied as extending to the enjoyment of anything beyond the demised premises. *Id.*

6. Nor to override other necessary implications in the lease. *Id.*

7. *Mack v. Patchin* (42 N. Y., 171) explained in this particular. *Id.*

8. Where the lessor did the grading under an option given, by the ordinance, to the owners of adjoining property,—*Held*, that in so doing he acted as the agent of the city, and his act was the act of the latter. *Id.*

9. And that the act of the plaintiff not being willful or trespass, the defendant's damages could not be counter-claimed or recouped against his claim for rent. *Id.*

10. Where taxes are assessed upon the demised premises, which, by covenant in the lease, the tenant is to pay, but refuses to do so on demand after warrant issued for their collection, the lessor may pay the same and recover the amount from him. *Id.*

*See* CORPORATION, 1 to 10.

## LEGACY.

1. In determining whether a legacy to a corporation would increase its property beyond what the law authorizes it to hold, the indebtedness of the corporation for its property is to be deducted from the estimate. *Wetmore v. Parker.*  
121

2. Where there was a bequest of the residuum "to the several persons, corporations and societies to whom I have hereinbefore made bequests, in proportion to the amounts bequeathed to them respectively,"—*Held*, that codicils, revoking certain general legacies for specific objects, did not affect the interests which the legatees took in the residuum by reason of such prior bequests. *Id.*

*See* ACCOUNTING, 1, 2, 4.  
DEVISE, 6, 7, 8, 9 to 15.  
EXECUTORS AND ADMINISTRATORS, 1 to 4, 8, 9, 10, 21, 22.  
PURCHASER PENDENTE LITE, 1, 2, 3.  
TRUSTS AND TRUSTEES, 6, 7.

## LEGAL MAXIMS.

*See* EQUITABLE CONVERSION, 1.

## LEGATEES.

*See* ACCOUNTING.  
EXECUTORS AND ADMINISTRATORS, 1 to 5, 21, 22.

## LEGISLATIVE APPROPRIATION.

*See* CORPORATION, 10, 11,

## LEGITIMATE HEIRS.

*See* DEVISE, 2, 3.

## LESSOR AND LESSEE.

*See* ATTACHMENT, 6.  
LEASE.

## LETTER.

*See* EVIDENCE, 24.  
HUSBAND AND WIFE, 2.

## LEVY.

*See* ATTACHMENT, 3, 4, 5, 7, 8, 9.

## LIABILITY.

*See* RECEIVER, 4, 5, 6.

## LICENSE.

*See* ATTACHMENT, 6.  
PRESCRIPTION, 1.

## LOAN.

*See* ATTACHMENT, 6.

## LOCAL ACTION.

*See* NEGLIGENCE, 7.

## LOWVILLE.

*See* VILLAGES, 1 to 6.

## MALICIOUS ACTS.

*See* HIGHWAYS, 2.

## MAP.

*See* CONTRACT FOR SALE OF REAL ESTATE, 6.  
EVIDENCE, 15.



**MARITIME TORT.**

*See* MUNICIPAL CORPORATION, 3, 4.

**MARRIED WOMEN.**

1. Under the existing statutes of this State an action at law cannot be maintained against a married woman by her husband upon a contract to pay him for services rendered to her by him personally. (MILLER, P. J., *contra.*) *Perkins v. Perkins.* 19
2. The acts conferring additional privileges upon married women, were passed solely to enfranchise married women and to protect their property, and were not intended to confer any additional rights or privileges upon the husband. (P. POTTER, J.) *Id.*
3. The nature of the marital relation requires that a contract claimed to have been made between husband and wife to pay for services rendered, should be carefully scrutinized with a view to ascertaining whether the services were not performed voluntarily and as a part of their respective duties to each other, and where the agreement to compensate for services rendered cannot be conclusively shown, or clearly inferred from the facts, no recovery should be allowed. (Per MILLER, P. J.) *Id.*
4. A married woman, having signed a note as principal, with her husband as surety, sent her order to the payee requesting that the moneys be sent to her by the holder of the order, and they were paid thereupon to such holder. *Held*, that although the presumption might be, from this payment, that the money was received by her, and applied to benefit her estate, yet this presumption was overcome by proof that the moneys were actually paid to the husband by the party receiving them. *Prendergast v. Borst.* 489
5. *So held*, upon the authority of *White v. McNett* (83 N. Y., 871). *Id.*

*See* ACKNOWLEDGMENT, 1, 2.

CONSIDERATION, 3.

DURESS, 1, 2, 3.

STATUTES OF LIMITATION, 4, 5.

**MASTER AND SERVANT.**

1. Employees in special and dangerous services should be fitted, by the habits of carefulness, obedience, &c., which are necessary for their safe performance. *Sizer v. Syracuse, Binghamton & N. Y. R. R. Co.* 67
2. If one is employed for such services with knowledge of his lack of such fitness, *e. g.*, one known to be disobedient where the safety of his fellow-servants requires implicit obedience, the employer is liable to his other servants or employees for injury resulting from such lack of fitness; but it is otherwise where knowledge of the unfitness is not brought home to the employer; or it seems to one who acts for the employer (a corporation) in hiring employees for the service. *Id.*

**MEASURE OF DAMAGES.**

*See* DAMAGES.

**MEDICAL TESTIMONY.**

*See* SURROGATE, 1.

**MEMORANDUM.**

*See* EVIDENCE, 20.

**MENTAL CAPACITY.**

*See* SURROGATE, 1, 2.  
WILL, 1, 2, 3.

**MERGER.**

*See* EVIDENCE, 13.

**METES AND BOUNDS.**

*See* MORTGAGE, 1.

**MISREPRESENTATIONS.**

*See* PRINCIPAL AND AGENT, 3.

**MISTAKE.**

*See* EVIDENCE, 3.  
INSURANCE, 5, 6.

**MONEY DUE.**

*See* CONTRACT, 6.

**MONEY HAD AND RECEIVED.**

*See* ACTION, 4.

**MONEY PAID.**

*See* SUPPLEMENTARY PROCEED-  
INGS, 3.

**MORTGAGE.**

When the description in a mortgage of real estate, situated in a city, correctly gives the street number of the lot intended to be mortgaged, but by metes and bounds describes an adjoining lot, subsequent purchasers of the lot designated by the street number, having constructive notice of the mortgage, may rely upon the description by metes and bounds as being the correct one of the premises conveyed, and are not charged with notice sufficient to put them upon inquiry, as to the property intended, by the fact that the street number is correctly stated. *Thomson v. Wilcox*. 376

*See* ACCORD AND SATISFACTION, 1.  
ESTOPPEL, 1.  
EVIDENCE, 3, 4, 5.

*See* INSURANCE, 1.  
PRACTICE, 7.  
RECORDING ACT, 1, 2, 3.

**MORTGAGE FORECLOSURE.**

1. Upon a mortgage foreclosure, the premises having been sold, the title to the property proved defective by reason of the owners of the equity of redemption not being made defendants; thereupon the sale was vacated by order of the court, and a second sale ordered after bringing in the proper parties. The referee who made the first sale returned, to the purchaser, all of the deposit made at that sale, excepting his fees and expenses. *Held*, it not appearing that the plaintiff or his attorneys were guilty of negligence in not making the proper parties, the purchaser upon the first sale was entitled to be refunded, out of the surplus moneys arising on the second sale, the balance unpaid him upon his deposit, with interest thereon, and the amount paid by him for services of counsel and official searches in investigating the title. *Raynor v. Selmes*. 440

2. *So ordered*, however, without prejudice to a motion by the owner of the equity of redemption, to compel the plaintiff to refund such moneys. *Id*.

3. *Morris v. Mowatt* (2 Paige, 586) held applicable and followed. *Id*.

4. The rules governing the rights of purchasers and of referees upon sales under judgments of mortgage foreclosure, where the title is defective, stated by INGRAHAM, P. J. *Id*.

*See* PLEADING, 1, 2.

**MOTION.**

*See* ALIMONY, 1, 4.  
PRACTICE, 1.  
SUPPLEMENTARY PROCEED-  
INGS, 1.

MULTIPLICITY OF SUITS.

*See* ACTION, 2.

MUNICIPAL CORPORATION.

1. A city common council having authority to pass ordinances to preserve its harbors and water channels, and "to prevent and punish the casting and depositing therein, or the causing to be floated, drifted and deposited therein, of any substance which, in their judgment, may be liable to obstruct the same; to prevent and remove all obstructions therein and to punish the authors thereof," may pass an ordinance imposing penalties for depositing, &c., certain substances in a particular river, or the canals, raceways, &c., leading into it, which is, in fact, a harbor or water channel, without declaring therein that the river is such harbor or channel, and that the substances so deposited, &c., may get into or tend to obstruct the same. *City of Ogdensburgh v. Lyon.* 215

2. Accordingly, a complaint for depositing, &c., prohibited substances in the river named in the ordinance, stating that the river is a harbor or water channel of the city, states a cause of action. *Id.*

3. Assuming that the United States courts have exclusive jurisdiction of maritime torts, and that placing obstructions in navigable waters is such a tort, still the State legislature may confer upon municipalities, where navigable waters and harbors exist, police authority over the same, and the violation of a regulation adopted by the municipal authority, within the power conferred, is within the jurisdiction of the State courts. *Id.*

4. *Held*, accordingly, that this court has jurisdiction of an action for the recovery of a penalty, prescribed by such an ordinance, for its violation, and that the act of the legislature under which the ordinance was passed was valid. *Id.*

*See* CONTRACT, 2, 3.  
STATUTE OF FRAUDS, 1 to 7.  
TOWN RAILROAD COMMISSIONERS, 1 to 4.  
VILLAGES.

MUTUAL, OPEN AND RUNNING ACCOUNT.

*See* ACCOUNT, 3.

NATURALIZATION.

*See* ALIENS, 2.

NEGLIGENCE.

1. The omission to look both up and down a railroad track before attempting to cross it, is such negligence as prevents a recovery against the railroad company in case of accident. *Haight v. N. Y. Central R. R. Co.* 11

2. It is no excuse if the precaution is neglected until too late to avoid an approaching train. *Id.*

3. There is an implied duty on the part of shippers of dangerous goods to give notice of their nature to the carrier, or persons acting for him, in receiving them. *Barnes v. Burslenbinder.* 210

4. Omission to perform this duty is negligence, and renders the shipper liable for the consequences. *Id.*

5. If an agent, in the course of his ordinary employment, ships such goods without notice of their nature, the principal is liable. *Id.*

6. The defendant shipped nitroglycerine to Los Angeles, Cal., by the plaintiff, a carrier, without notice of the nature of the shipment. The package leaked and was taken by the defendant to a warehouse of San Francisco for examination, and, while being opened, exploded, damaging the warehouse and freight stored

there. *Held*, that the defendant was liable for the damages, although the opening of the package was the direct cause of the explosion. *Id.*

7. *Held*, further, that although the damages were in part to real estate in California, an action for their recovery was in its nature personal and transitory, and might be brought wherever the defendant could be found and served. *Id.*

See MASTER AND SERVANT, 1, 2.  
RAILROAD COMPANY, 1, 3.  
STOCK CERTIFICATE, 2 to 5.  
VILLAGES, 3.

#### NEW YORK CITY AND COUNTY.

1. The provisions of section 8 of chapter 882 of Laws of 1870, prohibiting the board of supervisors of New York county from creating any new office or department, &c., are, *it seems*, embraced within the title of the act, and constitutional. (Per DAVIS, J.) *Druks v. Mayor of N. Y.* 340
2. Section 6 of chapter 264 of 1858, by which the police justices are empowered to appoint for their courts "such other clerical help \* \* \* as shall be deemed necessary by the board of supervisors," does not give the appointing power to the supervisors, but to the justices. *Id.*
3. *Held*, accordingly, that an appointment under that section of an assistant clerk, ratified by the board of supervisors, was not an appointment by the supervisors, and not prohibited by section 8 of chapter 283 of the Laws of 1870. *Id.*
4. The restriction upon the power of increasing salaries, made by section 11 of chapter 876 of the Laws of 1869, is within the scope and title of that act. *Id.*
5. The board of supervisors of New York by resolution fixed the plaintiff's salary as assistant clerk of the Police Court at the same amount

as allowed to the clerks of that court. The amount of salary allowed to these clerks had been fixed at \$2,500 and increased to \$4,000. *Held*, the increase being illegal under chapter 876 of 1869, that the resolution of the supervisors must be construed to have intended the amount lawfully allowed to those clerks, viz., \$2,500, and that plaintiff must be deemed to have known the illegality of the increase. *Id.*

6. The non-presentment for audit of a claim for official salary against the city of New York, accrued during 1871, to the board of auditors created by chapter 9 of 1872, does not work a forfeiture of the claim, but only of the right to demand payment out of the moneys raised under the provisions of that act. *Id.*
7. The provisions of section 10 of chapter 876 of 1866 are applicable only to the appropriations made by that act. *Id.*

#### NEW YORK CLEARING- HOUSE.

See NOTES AND BILLS, 1 to 9.

#### NOTES AND BILLS.

1. In the New York Clearing-house Association, checks received for clearance are credited to the sender and charged to the drawee. Their validity is not open to dispute there, but must be settled by the parties, who are to receive and return disputed checks on the same day to the sender, who must reimburse the drawee. Whether checks paid through the clearing-house and charged by the drawee to his customer are paid within the rule which charges a drawee with the responsibility of mistaking his drawer's signature, *quære. Story v. National Mechanics' Banking Association.* 197
2. But held that repayment by the sender of checks so paid is a waiver of the rule. *Id.*

3. So, also, does it waive delay of the drawee beyond the day in returning the check. *Id.*
4. Nor is a repayment induced by threat to discontinue exchanges void for coercion. *Id.*
5. The M. and M. Bank, a member of the clearing-house, and agent there for the plaintiff, which was not, received from the latter on different days several forged checks taken on deposit from the forger. The M. and M. Bank credited the checks to the plaintiff and sent them to the clearing-house, where the M. and M. Bank was credited, and the defendant, the drawee, another member of the clearing-house, charged with them. The defendant, without noticing the absence of a private mark understood between them, charged the checks as received from the clearing-house to the supposed drawers. On receipt of the last check, several days after the receipt of the others, the defendant discovered the forgery, and on the same day tendered the checks and demanded payment of them from the M. and M. Bank, which referred it to the plaintiff. The plaintiff had meanwhile paid the forger's drafts to the amount of the checks deposited, and refused to pay. The M. and M. Bank then gave the defendant its own check for the last of the forged checks, and the defendant sent the remaining forged checks with the M. and M. Bank's check through the clearing-house to the M. and M. Bank. The latter, complying with the clearing-house rules, paid them all and charged the amounts to the plaintiff's account, and sent the latter the four forged checks. The plaintiff retained the checks and tendered them the next day to the defendant and demanded payment and was refused. Some twenty days after, the plaintiff sent them by its agent, the M. and M. Bank, through the clearing-house to the defendant, which paid them and directly returned them through the clearing-house to the M. and M. Bank, with notice that if they were sent back through the clearing-house it would discontinue its exchanges with the

M. and M. Bank. The latter bank returned and charged the checks to the plaintiff. The plaintiff, as assignee of the M. and M. Bank, sued to recover the amount of the checks.

*Held*, that the M. and M. Bank had waived its right, if any, to insist upon the acts of the defendant as payment of a forged check by the drawee, and had affirmed the acts of the defendant in obtaining repayment. *Id.*

6. That the waiver was not void for coercion. *Id.*
7. That having received the checks and passed them to the plaintiff's credit in its ordinary account, the M. and M. Bank became actual owner of the checks and was rightly treated as principal; but *held*, also, that if not rightly so treated it might not, as agent of the plaintiff, refund to the defendant without actual authority. *Id.*
8. *Held*, further, that the plaintiff having given authority to the M. and M. Bank to act for it under the clearing-house rules, which required it to act as principal, the plaintiff was bound as to third parties by the acts, as principal, of the M. and M. Bank. *Id.*
9. The defendant drew a draft or order in plaintiff's favor (not negotiable), which, if accepted and paid, was to pay a balance of an account. There was an account between the defendant and the drawee, which they afterward settled, but the balance was in the drawee's favor, and no allowance was made for the draft. *Held*, that the defendant was not discharged by the plaintiff's failure to present the draft and give notice of non-payment. *Stewart v. Millard*. 878

See CONSIDERATION, 1 to 4.  
EVIDENCE, 19.  
MARRIED WOMEN, 4, 5.

## NOTICE.

See AGRICULTURAL SOCIETY, 6.  
APPEAL, 1.

*See* ATTACHMENT, 7.  
 MORTGAGE, 1.  
 NEGLIGENCE, 3 to 7.  
 NOTES AND BILLS, 9.  
 PLEDGE, 3.  
 PRACTICE, 1, 3.  
 PURCHASER PENDENTE LITE, 1,  
 2, 3.  
 RECORDING ACT, 2, 3.  
 STOCK CERTIFICATE, 4.  
 SUMMONS.

### NUISANCE.

*See* HIGHWAYS, 1.

### OBJECTION.

*See* PRACTICE, 8.

### OFFICE.

*See* ELECTION, 1 to 7.

### OFFICER.

*See* ATTACHMENT, 4, 5.  
 CONTRACT, 2, 3.  
 SHERIFF.

### ONUS PROBANDI

*See* EVIDENCE, 6, 7.  
 EXECUTORS AND ADMINISTRATORS, 4.  
 VILLAGE, 4, 5.

### OPTION.

*See* LEASE, 8.

### ORDER.

*See* ALIMONY, 1, 4.  
 APPEAL, 1.  
 JURISDICTION, 1, 2, 3.  
 PRACTICE, 1, 2, 3, 9.  
 SUPPLEMENTARY PROCEEDINGS, 1, 2.

### ORDINANCE.

*See* LEASE, 2, 3, 8, 9.  
 MUNICIPAL CORPORATION, 1  
 to 5.

### PAROL AGREEMENT.

*See* ACCORD AND SATISFACTION, 1.

### PAROL EVIDENCE.

*See* EVIDENCE, 19.

### PARTICEPS CRIMINIS.

*See* CORPORATION, 7 to 10.

### PARTITION.

1. An objection in partition, that the complaint does not aver that the plaintiff is in possession of the premises, is too late when first made on appeal after judgment; and it seems, although no possession should be proved. *Howell v. Mills.* 193
2. It seems the objection should be taken by demurrer or answer. *Id.*
3. Constructive possession as the tenant in common of an undivided share of the premises is sufficient possession to support the action. *Id.*
4. Where there is actual possession by the tenant for life, it may be maintained between the remainder-men in fee; and this is so where the remainder in fee is liable to be divested for the benefit of the survivors, upon the death of one. *Id.*
5. The estate of a tenant for life, in possession, was sold under a mortgage of it. A remainder-man in fee brought partition against his co-tenant (an infant) in the remainder, which was liable to be divested by the death of either, with-

out issue, for the benefit of the other, and joined the purchaser as a party, against whom there was judgment by default. A decree was made for sale, payment of the value of the life estate in gross, and investment of the balance for the benefit of the remainder-men, and payment of the income and principal according to their rights and interests. On appeal by the defendants the decree was affirmed. *Id.*

6. It seems section 448 of the Code was intended to retain all the provisions of the Revised Statutes in relation to the partition of lands, with the simple exception of changing it from a proceeding by petition to an action under the Code. *Rosekrans v. White.* 486

7. The wife of a tenant in common need not join as plaintiff with him in an action to partition his property. She is a necessary party, but more fittingly a defendant than plaintiff. *Id.*

8. An objection that she is made defendant, and not a co-plaintiff, with her husband, could not avail other defendants in the action. *Id.*

#### PARTNERSHIP.

1. Where a partner sells his interest in his firm, including the stock and excepting the accounts and indebtedness due it, to his copartners, the sale covers amounts which the vendees have failed to pay in as partners to make their respective shares of the capital stock equal to the capital paid in by him, as well as their liability for moneys withdrawn by them from the firm. *Flynn v. Fish.* 117

2. One entered into a sealed contract for street repairs with a municipal corporation, then took a partner, with whom he performed the work and agreed to share the profits, and, after the completion of the work, died. *Id.*

3. *Held*, that the remaining partner could not sue at law for the mo-

neys due on the contract or any part of them. *Duff v. Gardner.* 165

4. *Held*, further, the corporation having paid the money into court, and procured a substitution of the deceased partner's executor, as defendant, that the latter was entitled to judgment for the amount due. *Id.*

5. And it seems the executor would be bound to fulfil the contract, on decease of the contractor, and entitled to receive the price of work done after his testator's death. *Id.*

6. Upon the representation of one of the partners that M. was to be taken into the firm of J. L. B. & Co. at a certain day, in which representations M. joined, the plaintiffs sold and delivered goods for the new firm, to be paid for after the day named; the new firm was not formed, and notice of this fact was not given to the plaintiffs, who, after the day, took the note of J. L. B. & Co. for the goods. *Held*, that M. was jointly liable with the partners for the goods. *Stiles v. Meyer.* 190

7. In an action to recover against M., the plaintiffs might prove what the statement was, on the faith of which the goods were sold. *Id.*

8. By an agreement in writing between the members of an association it was provided that the plaintiff, a member thereof, should furnish certain information to such association, not specifying whether by parol or otherwise. The association afterward resolved, without assent of the plaintiff, that such information should be entered by him upon books provided for that purpose. *Held*, in an action brought for an accounting against other members of the association, that a finding that plaintiff was bound to comply with the resolution, when notified to do so, was sufficiently favorable to defendants. *Luce v. Hartshorn.* 331

9. Whether the plaintiff was bound to comply with a resolution by which the terms of the original

agreement were varied, without assenting thereto, *quere.* *Id.*

10. The rule, that the property of a partnership shall be first applied to the payment of the debts before any division of the assets, applies where one of the members is to be compensated for his services out of the profits. *Id.*

11. But an amount due a member for services, out of profits, as shown by an account rendered him, and acted on by the partnership, is recoverable, although a greater claim by a stranger, as to which the partnership denies liability, and, not noticed in the account, is proved in the action. *Id.*

12. Nor can the partnership avail itself of such a claim against it as a defence to the recovery without pleading it as such. *Id.*

*See* DEVISE, 14.  
RAILROAD COMPANY, 1.

#### PARTY TO ACTION AND PROCEEDING.

*See* ACCOUNTING, 1 to 5.  
CERTIORARI, 5, 6, 7.  
DEVISE, 14.  
EXECUTORS AND ADMINISTRATORS, 18 to 23.  
PARTITION, 7, 8.  
PURCHASER PENDENTE LITE.

#### PARTY TO FRAUD.

*See* HUSBAND AND WIFE, 1, 3.

#### PASSWAY.

*See* WAY.

#### PATENT-RIGHT.

*See* TRADE-MARK, 4.

#### PAYMENT.

*See* CONTRACT, 6.  
NOTES AND BILLS, 9.  
PRINCIPAL AND AGENT, 1, 2.

#### PAYMENT INTO COURT

*See* PARTNERSHIP, 4.

#### PEDIGREE.

*See* EVIDENCE, 12.

#### PENALTY.

*See* DAMAGES, 1 to 3.  
GAME LAWS, 1.  
MUNICIPAL CORPORATION, 4.

#### PERFORMANCE.

*See* CONTRACT, 4, 5.

#### PERSONAL COVENANT.

*See* RECEIVER, 1 to 7.

#### PETTIT LARCENY.

*See* LARCENY, 1 to 6.

#### PETITION.

*See* CERTIORARI, 1, 5, 6.  
EXECUTORS AND ADMINISTRATORS, 15, 16.

#### PHYSICIAN.

*See* SUREGATE, 1.

#### PLACE OF BIRTH

*See* EVIDENCE, 12.



PLEADING.

1. An answer in foreclosure, alleging the invalidity of the mortgage in suit, and title to the premises under a subsequent mortgage, is not a counter-claim, but an equitable defence. *Caryl v. Williams*. 416
  2. An answer in an action to foreclose a mortgage, that it is of no binding effect and no lien upon the premises described in the complaint, is a statement of a conclusion unsupported by facts, and unavailing. *Id.*
- See* ACTION, 1, 2.  
 CORPORATION, 11.  
 EVIDENCE, 1.  
 INSURANCE, 6.  
 MUNICIPAL CORPORATION, 2.  
 PARTITION, 1.  
 PARTNERSHIP, 12.  
 SHERIFF, 1.

PLEDGE.

1. A pledgee who purchases the pledge at public sale is not chargeable with conversion. *Bryan v. Baldwin*. 174
2. If the purchase is invalid, the relation of pledgor and pledgee are unchanged. *Id.*
3. Where stock, pledged as collateral to a note, due at a certain day, with authority to sell on default, was sold by direction of the pledgee, and purchased by him, at public auction, after two days' written notice of the time and place had been left, in the absence of the pledgor, at his office, with a person in charge thereof,—*Held*, that the pledgee became legally vested with the title and the pledgor could not offset the actual value of the stock against the pledgee's claim for the balance of the note. *Id.*
4. The opinion of SHAW, J., in *Granite Bank v. Ayers* (16 Pick., 392), upon the sufficiency of the notice of sale, approved and followed. *Id.*

POLICE AUTHORITY.

*See* MUNICIPAL CORPORATION, 3, 4.

POLICE COURT CLERK.

*See* NEW YORK CITY AND COUNTY, 1 to 8.

POLICE JUSTICES.

*See* NEW YORK CITY AND COUNTY, 1 to 8.

POSITIVE AND PEREMPTORY STATUTE.

*See* CANAL BOARD, 1.

POSSESSION.

*See* RECORDING ACT, 3.

POWER IN TRUST.

*See* DEVISE, 9, 10.

POWER OF ATTORNEY.

*See* STOCK CERTIFICATE, 1 to 4.

POWER OF SALE.

*See* EQUITABLE CONVERSION, 1, 2.

POWER TO SUE.

*See* CORPORATION, 12 to 16.

POWERS.

*See* DEVISE, 9, 10, 13.  
 TRUSTS AND TRUSTEES, 1 to 6.

## PRACTICE.

1. An order, vacating an order of discontinuance without costs unless the plaintiff shall pay the defendant's attorney's costs, entered *pendente lite* on the stipulation of the plaintiff, his attorney, and the defendant, who was insolvent, after notice from defendant's attorney forbidding discontinuance without payment of his costs, — *Held*, to be proper relief on motion and affirmed. *Wormer v. Canon*. 36
  2. Except as between the parties to an action, it is discontinued only only upon entry of the order therefor. *Id.*
  3. Notice of claim for costs before entry of the order is in time, no value having been paid for stipulating to discontinue. *Id.*
  4. Supreme Court Rule 40, which provides that neither party, where a feigned issue has been tried, shall question the rulings at the final hearing or subsequently, unless he has moved for a new trial, does not preclude the court, where the case is brought on for final hearing, from rejecting the verdict and ordering a new trial *ex mero motu*, or from deciding the question of fact for itself. *Brown v. Clifford*. 46
  5. And the court may, likewise, accept the verdict upon the facts found. *Id.*
  6. Questions of law decided on appeal from a verdict rendered on a feigned issue, are *res judicata* in the action. *Id.*
  7. Where, in an action alleging that by agreement at the execution and delivery of an absolute deed it was taken as mere security, a feigned issue, presenting the question whether the deed was made and executed as security, was tried, and the jury found affirmatively, — *Held*, that the finding was substantially that the agreement averred in the complaint had been made. *Id.*
  8. An objection does not lie on appeal because a judgment gives the relief intended more minutely than specified in the decision, if the relief is not enlarged. *Applegate v. Morse*. 59
  9. Reversal by the General Term of an order denying a motion in the County Court to set aside proceedings does not without an order to that effect set them aside. *Miller v. Adams*. 131
  10. No request having been made on the trial to submit a controverted fact to the jury, it becomes the province of the court to determine the fact, and its decision is final. *Excelsior Fire Insurance Co. v. Royal Ins. Co.* 138
  11. Where a charge to the jury considers the testimony only on one side, and the counsel for the other side objects, without requesting a charge upon the remaining testimony, he has no benefit from the exception. *Magovern v. Staple*. 219
  12. Where an action is brought in equity and the demand is for purely equitable relief, the trial of questions of fact by the court is in its discretion. *Rexford v. Marquis*. 249
- See* APPEAL, 1.  
 CERTIORARI.  
 EQUITABLE RELIEF, 3.  
 JURISDICTION, 1.  
 LARCENY, 1 to 6.  
 PRESCRIPTION, 1.  
 SUMMONS, 1.  
 TENANTS IN COMMON, 4 to 7.

## PRACTICE ON APPEAL.

*See* PRACTICE, 8, 9.

## PRACTICE ON TRIAL.

*See* PRACTICE, 4 to 8, 10, 11, 12.

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## PRESENTMENT OF BILL.

*See* NOTES AND BILLS, 9.

**PRESCRIPTION.**

In an action to restrain the defendant, an owner and occupant of adjoining premises, from interference with the plaintiff's right to draw water from a well thereon, the court, upon a finding that by arrangement between the builder of the well and owner and occupant of the plaintiff's lot it had been owned and used in common by the adjoining owners and their successors in titles, under claim of right, gave judgment for plaintiffs. *Held*, error, as the finding was not a sufficient foundation upon which to base an inference of right by prescription, but amounted to a finding of a mere license. *Applegate v. Morse*. 59

**PRESUMPTION.**

*See* ACTION, 4.  
ATTACHMENT, 2.  
EASEMENT, 4.  
EVIDENCE, 6, 7.  
EXECUTORS AND ADMINISTRATORS, 4, 15.  
JURISDICTION, 2, 3.  
MARRIED WOMEN, 4, 5.  
PRINCIPAL AND AGENT, 2.  
RAILROAD COMPANY, 2.  
WILL, 1, 2.

**PRINCIPAL AND AGENT.**

1. The respective agents of the plaintiff and defendant agreed, on their behalf, that the defendant should pay a part of his indebtedness to the plaintiff in satisfaction of the whole, partly in cash, partly in the defendant's note. The note of defendant was given, and the defendant's agent gave the draft of his (the agent's) firm, drawn on New York in favor of the plaintiffs, in payment of the cash. *Held*, that the taking of the draft of the agent's firm in part payment was a sufficient consideration for the discharge of the claim, and an action to recover the balance was not maintainable. *Bliss v. Swarts*. 156

2. *Held*, further, that the giving of this firm draft by the agent could not be regarded as payment of the money of his principal, but was presumptively to advance the funds of his firm. *Id.*  
3. The plaintiff made a contract to sell his real estate upon the advice of his agent. Some two days after the latter took an assignment from the vendee and made a new contract for sale to other purchasers at an increased price. He then informed the plaintiff that his (defendant's) assignor had sold the property to the last vendees, and, suppressing the price, obtained from him a deed, with consideration in blank to be filled in, to the purchasers. *Held*, that the defendant's confidential relation to the plaintiff continued until after the execution of the deed, and that the plaintiff was entitled to the benefit of the increased price. *Bain v. Brown*. 506

*See* CORPORATION, 1 to 5,  
HUSBAND AND WIFE, 3.  
INSURANCE, 2, 4.  
LEASE, 8, 9.  
NEGLIGENCE, 5, 6.  
NOTES AND BILLS, 5, 8.  
REAL ESTATE BROKERS, 1, 2.

**PROBATE OF WILL.**

Service of citations to probate of a will before the surrogate by a party interested, is legal and valid. *Wetmore v. Parker*. 121

*See* WILL, 3.

**PROCEEDINGS SUPPLEMENTARY TO EXECUTION.**

*See* EXEMPT PROPERTY, 1.

**PROFITS.**

*See* PARTNERSHIP, 10, 11.

**PROMISSORY NOTES.**

*See* EVIDENCE, 19.  
NOTES AND BILLS.

**PROPERTY EXEMPT FROM EXECUTION.**

*See* EXEMPT PROPERTY.

**PROPOSAL.**

*See* STATUTE OF FRAUDS, 1.

**PROTECTION BY ORDER.**

*See* JURISDICTION, 2, 3.

**PUBLIC OFFICER.**

*See* ATTACHMENT, 4, 5.  
SHERIFF.

**PUBLIC POLICY.**

*See* CONTRACT, 1, 2, 3.  
CORPORATION, 7 to 10.

**PURCHASER.**

*See* EVIDENCE, 17, 18.  
GAME LAWS, 1.  
MORTGAGE, 1.  
MORTGAGE FORECLOSURE, 1 to 6.  
PURCHASER PENDENTE LITE.  
RECORDING ACT, 1, 2, 3.  
SHERIFF, 6, 7.  
TRUSTS AND TRUSTEES, 1 to 4.

**PURCHASER PENDENTE LITE.**

1. It seems one who takes title to land from a party to an action, pending in regard to it, is charged, as his grantee would have been, by the judgment. *Salisbury v. Morea*. 359

2. A charge by will upon land follows the land in the hands of devisees of the original devisee thereof and their grantee, especially if the latter was chargeable with actual notice of proceedings involving the question of such charge, and that an action lies against them in equity, by the executor of the devisee, for its recovery. *Id.*

3. And this is so where the executor might have paid the legacy out of the personal estate bequeathed to the devisee, and was also administrator, with the will annexed, of the devisee, and had administered his personal estate without provision for the legacy; the property of both estates having been administered under the provisions of the wills and directions of the surrogate in proceedings to which they were parties. *Id.*

**QUESTIONS OF LAW AND FACT.**

*See* EVIDENCE, 5.  
FINDING.  
PRACTICE, 6, 10.

**QUITCLAIM DEED.**

*See* ESTOPPEL, 2, 3.

**QUO WARRANTO.**

*See* ELECTION.

**RAILROAD COMMISSIONERS.**

*See* TOWN RAILROAD COMMISSIONERS.

**RAILROAD COMPANY.**

1. A railroad company which sells passenger tickets for its own road, with the ordinary coupons attached for connecting roads, to a point beyond its own terminus, is

the absence of proof of agency, as partner, or otherwise, for such roads, contracts for through transportation to that point. But the intermediate carriers are only responsible for transportation over their respective lines. *Kessler v. N. Y. Central R. R. Co.* 62

2. Upon a question as to the terms of the contract, in the absence of proof as to the form of ticket, it may be assumed to have been in the ordinary form, viz.: Entitling the holder to the passage on presentation of the coupons to the carriers named therein. *Id.*

3. Where it was shown that the plaintiff purchased a ticket from the railroad company for conveyance over its own line, with coupons attached for connecting roads, and received on delivery of her baggage a check marked with the name of each road, and that the defendant, the last carrier, failed to deliver the baggage for the check at the point of destination, *Held*, that there was no proof of delivery to the defendant or of loss while in its possession, and that the defendant was not liable. *Id.*

*See* CORPORATION, 1 to 10.  
MASTER AND SERVANT, 1, 2.  
NEGLIGENCE, 1, 2.

## RAILROAD MUNICIPAL BONDS.

*See* CERTIORARI, 1 to 8.

## RATIFICATION.

*See* CORPORATION, 4.

## REAL ESTATE AGENT.

*See* PRINCIPAL AND AGENT, 3.  
REAL ESTATE BROKERS, 1, 2.

## REAL ESTATE BROKERS.

1. Real estate brokers, employed as middle-men, to bring purchasers together to enable them to make their own bargain, may charge commissions to both parties. *Siegel v. Gould.* 177
2. They are not agents to buy and sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller. *Id.*

## REAL ESTATE CONTRACT.

*See* CONTRACT FOR SALE OF REAL ESTATE.  
REAL ESTATE BROKERS, 1, 2.

## RECEIVER.

1. An assignment running in the name of J. P., receiver, &c., and signed "J. P., receiver," contained a covenant that the assigned claims were due and unpaid. *Held*, that J. P.'s intention was to covenant officially, not individually. *Livingston v. Pettigrew.* 405
2. Otherwise the intent to make a personal covenant should have been expressed. *Id.*
3. Whether a receiver may not covenant, as receiver, that claims are due and unpaid, *quere.* *Id.*
4. Having so covenanted, however, he is not liable personally on his covenant. *Id.*
5. Cases in which executors, administrators and trustees have been held personally liable upon their covenants, distinguished. (Per MILLER, P. J.) *Id.*
6. Whether the covenant made, without prior agreement therefor, on giving a written assignment of the claims, and after the sale and the delivery of a bill of sale, without new consideration, is supported by any consideration, *quere* *Id.*

## RECIPROCAL DEMAND.

*See* ACCOUNT, 3.

## RECITAL.

*See* EVIDENCE, 17.

## RECORDING ACT.

1. If a mortgage given to secure an existing indebtedness extends the time for its payment, there is a new consideration, making the mortgagee a purchaser for value under the recording act. *Cary v. White*. 1
2. Where the mortgagor secured his indebtedness by a mortgage which postponed the time of payment for six months, but was upon land already conveyed by the mortgagor, *Held*, the mortgagee having no knowledge or constructive notice of the deed, that he need not repudiate the mortgage for fraud and proceed on the original indebtedness, but might foreclose. *Id.*
3. The conveyance was made by the mortgagor through a third person to his wife, and she continued to occupy the property with him, and was so occupying at the time of the execution of the mortgage. *Held*, that the mortgagee was not charged with notice of her title by reason of possession. *Id.*

*See* MORTGAGE, 1

## RECOVERY OF JUDGMENT.

*See* COSTS, 1 to 5.

## REDEMPTION FROM EXECUTION SALE.

1. Proof was made in ejectment that an affidavit on a creditor's redemption of real estate from execution sale was presented to the sheriff, of search in the county clerk's office for the redemption

papers, where they were not found, and of the probable destruction of such papers. *Held*, there being no distinct objection to the sufficiency of the search, that a copy of the affidavit was properly received in evidence. *Rice v. Davis*. 393

2. The redemption is not invalid, at least as respects the debtor, if one of several judgments, under which the creditor purports to have redeemed, is properly certified to the sheriff. *Id.*
3. And an affidavit proceeding upon all the judgments, but stating the amount due on each, is sufficient to support redemption under the one judgment properly certified. *Id.*
4. And to redeem from the redeeming creditor, the judgments improperly authenticated would not be entitled to payment. *Id.*
5. *Quere*, whether the judgment debtor may question the sufficiency of the creditor's payments on redeeming from another creditor. *Id.*
6. An affidavit that the affiant "is the person to whom the above several described judgments are assigned, and that the same are true copies of the original assignments of such judgments," that he "carefully compared them with such original assignments, and that they are true copies of such original assignments," proved by copy, the original being lost,—*Held*, a substantial compliance with the statute. *Id.*
7. Slight variations in the verification of the assignment are not fatal. *Id.*
8. The sheriff's certificate of redemption, in connection with his deed, held to establish that the affidavit and accompanying papers were properly presented to and left with the sheriff. *Id.*
9. *Held*, also, that the authority of a bank cashier to assign its judgment would be presumed from the

execution of an assignment by him. *Id.*

10. The sheriff's certificate of redemption is *prima facie* evidence of the facts stated in it. *Id.*

11. The regularity of the proceedings to redeem may be presumed from recitals in the sheriff's deed. *Id.*

12. An original sheriff's certificate of redemption, proved by copy on the trial as lost, may be used as evidence upon appeal. *Id.*

13. A redemption not made "on or after the last day of the fifteen months" held valid, although not made "in the county in which the sale took place." *Id.*

14. The homestead exemption act does not affect the rights of creditors to redeem from execution sales made under judgments docketed prior to the record of the notice of exemption. *Id.*

#### REFEREE.

*See* ACTION, 4.  
MORTGAGE FORECLOSURE, 1 to 6.

#### REFORMATION OF CONTRACT.

*See* INSURANCE, 5.

#### REINSURANCE.

*See* INSURANCE, 2, 3.

#### REMAINDER.

*See* DEVISE, 1.  
PARTITION, 4, 5.

#### RENT.

*See* LEASE.  
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#### REPRESENTATIONS.

*See* HUSBAND AND WIFE, 1, 3.  
PARTNERSHIP, 6, 7.

#### REPUGNANCY.

*See* DEVISE, 12.

#### REPLEVIN.

*See* SHERIFF, 1 to 6.

#### RESCISSION OF CONTRACT.

*See* CONTRACT FOR SALE OF REAL ESTATE, 1, 5.  
HUSBAND AND WIFE, 2.

#### RESIDUARY ESTATE.

*See* DEVISE, 6, 7, 8, 9 to 14.  
LEGACY, 2.

#### RESCINDING RESOLUTION.

*See* CANAL BOARD, 4.

#### RES JUDICATA.

*See* PRACTICE, 7.

#### RESOLUTION.

*See* CANAL BOARD, 4.  
PARTNERSHIP, 8, 9.

#### RETURNS.

*See* ELECTION, 1 to 7.

#### REVERSAL OF JUDGMENT.

*See* ATTACHMENT, 4, 5.

## REVERSAL OF ORDER.

*See* PRACTICE, 9.

## RESERVATION.

*See* WAY, 1, 2.

## RESIDENT ALIENS.

*See* ALIENS, 1, 2.

## RETURN.

*See* CERTIORARI, 7.

## RIGHT OF WAY.

*See* WAY.

## RIVERS.

*See* MUNICIPAL CORPORATION, 1 to 5.

## SALARIES.

*See* NEW YORK CITY AND COUNTY,  
4 to 8.

## SALE OF COLLATERALS.

*See* PLEDGE, 1 to 5.

## SALES OF CHATTELS.

*See* ACCOUNT, 1, 2, 3.  
CONTRACT, 6.  
EVIDENCE, 20 to 27.  
STATUTE OF FRAUDS, 7.

## SALE OF REAL ESTATE.

*See* CONTRACT FOR SALE OF REAL  
ESTATE.  
REAL ESTATE BROKERS, 1, 2.

## SCHNAPPS.

*See* TRADE-MARK, 2.

## SEARCH.

*See* CONTRACT FOR SALE OF REAL  
ESTATE, 1, 3.

## SECONDARY EVIDENCE.

*See* REDEMPTION FROM EXECUTION  
SALE, 1.

## SECURITY.

*See* DEVISE, 14.

## SERVICE OF CITATION.

*See* PROBATE OF WILL, 1.

## SERVICES.

*See* MARRIED WOMEN, 1 to 4.  
PARTNERSHIP, 10, 11.

## SHERIFF.

1. In an action to charge a sheriff, upon a recovery by the plaintiff as defendant in *replevin*, the complaint averring that the sureties failed to justify and no new sureties were furnished (Code, § 210), and "that the defendant became liable therefor," no denial of the averment being made and no question of liability by reason of the failure of the sureties to justify raised below, it seems the defendant's liability on that ground is conceded. *Hofheimer v. Campbell*. 157.
2. If the sureties turn out insufficient, the sheriff is liable under section 210 of the Code, in like manner as they are. *Id*



8. Failure of the sureties to justify is satisfactory evidence in an action against the sheriff that they were not qualified, and notwithstanding their affidavit to the contrary attached to the undertaking. *Id.*

4. Accordingly, if on exception to their sufficiency the sureties fail to justify, are not accepted, and new ones are not furnished, the sheriff is liable for moneys recovered with the property by the defendant in replevin. *Id.*

5. An agreement to discharge the sheriff from liability for non-justification of the sureties, upon his delivery to the defendant of the property replevined, is illegal and void. *Id.*

6. Neglect of the sheriff to return the execution does not affect rights acquired by purchasers at a sale regularly made under it. *Phillips v. Schiffer.* 847

7. The principal object of the act of 1835 (chap. 189) was the protection of sheriffs by creating a statutory mode of evidencing the claims of assignees of their certificates of sale, without which they could not be *compelled* to convey to such assignees. The sheriff may waive the protection, and if he does so and conveys to an actual assignee, the title of his grantee will not be affected by omission to prove and file the assignment of the certificate. *Id.*

*See* ATTACHMENT, 4, 5, 7 to 10.  
EVIDENCE, 17.  
REDEMPTION FROM EXECUTION SALE.

#### SHERIFF'S CERTIFICATE.

*See* EVIDENCE, 17.  
SHERIFF, 7.

#### SHERIFF'S DEED.

*See* EVIDENCE, 17, 18.  
SHERIFF, 6, 7.

#### SHERIFF'S SALE.

*See* EVIDENCE, 17, 18.  
GAME LAWS, 1.  
SHERIFF, 6, 7.

#### SHIPPERS.

*See* NEGLIGENCE, 3, 4.

#### SIDEWALKS.

*See* VILLAGES, 1 to 6.

#### SLUICEWAY.

*See* HIGHWAYS, 1, 2.

#### SOCIAL AND RECREATIVE CORPORATIONS.

*See* EVIDENCE, 8 to 12.

#### SOLDIERS' BOUNTY.

*See* EXEMPT PROPERTY, 1.

#### SOUNDNESS OF MIND.

*See* WILL, 1, 2, 3.

#### SPECIFIC PERFORMANCE.

*See* CONTRACT FOR SALE OF REAL ESTATE.

#### STATE COURTS.

*See* MUNICIPAL CORPORATIONS, 3, 4.

#### STATUTES CONSTRUED.

*See* ALIENS, 1, 2.  
ATTACHMENT, 7, 9.

*See* CANAL BOARD, 1, 2.  
 CONTRACT, 2.  
 COSTS, 1 to 5.  
 DAMAGES, 1 to 5.  
 EXECUTORS AND ADMINISTRATORS, 16.  
 MARRIED WOMEN, 1 to 4.  
 PARTITION, 6.  
 SHERIFF, 1, 2, 7.  
 STATUTE OF LIMITATIONS, 4, 5.  
 VILLAGES, 1 to 6.

### STATUTE OF FRAUDS.

1. A city council having designated the plaintiff's newspaper as "the official paper, in accordance with the former resolution of the common council, establishing an official organ," the resolution referred to providing for publication of its proceedings, and the city advertisements, in a paper to be designated for a term of three years, at a certain annual sum, and the current rates for advertisements, with authority to the city chamberlain to contract with the proprietors,—*Held*, that the resolution was in the nature of a proposal. *Argus Co. v. Mayor of Albany.* 264
2. *Held*, also, the resolution having been entered in the minutes of the council, which were signed, in the discharge of his duty, by its clerk, and an acceptance in writing having been signed by the plaintiff and filed with the clerk, that there was a valid contract in writing, &c., under the statute of frauds. *Id.*
3. *So held*, where both parties had acted under the agreement. *Id.*
4. The fact that both parties proceeded with the performance is sufficient to warrant the conclusion that the clerk was either originally empowered to subscribe the resolution in behalf of the corporation, and in that manner complete the memorandum required by the statute, or that his act in so doing was afterward ratified by the corporation. (Per DANIELS, J.) *Id.*
5. *Chase v. City of Lowell* (7 Gray, 35), approved and followed. *Id.*

6. And *held*, that if the resolution required a contract by the chamberlain, the requirement was waived. *Id.*

7. It being required by the city charter that a resolution involving an appropriation or expenditure of moneys be passed by a two third vote taken by yeas and nays and entered in the minutes,—*Held*, that the resolution did not require a vote in this manner, as the former one provided for the expenditure, and the latter provided a party who should perform the work. *Id.*

8. A delivery made, under an unwritten contract for sale of goods in value over fifty dollars, to one of several joint purchasers and acceptance by him, renders the contract valid as to all. *Smith v. Milliken.* 336

*See* ACCORD AND SATISFACTION, 1.

### STATUTES OF LIMITATION.

1. In the case of fraud clearly established, a court of equity is not barred by lapse of time from granting relief where the cause of action arose before the Revised Statutes. *Prindle v. Beveridge.* 225
2. Statutes of limitation contained in the Revised Statutes do not apply to causes of action or defences accruing before their passage. *Id.*
3. It seems that, except as provided by subdivision 6, § 91, of the Code, actions for specific relief in equity are to be brought within ten years. *Salisbury v. Morse.* 359
4. Under section 101 of the Code, before 1870, when the exception for the benefit of married women was stricken out by amendment, their disability under the statute of limitations was not continued after death in behalf of their estate. *Dunham v. Sage.* 419
5. Upon a married woman's decease, as the statute stood when that amendment was made, her repre-

sentatives had the usual time from the accruing of a debt in her favor, and an additional one year, allowed by the last clause of section 101, in which to bring an action. *Id.*

6. The failure of an appointment of executors upon an estate does not save the running of the statute of limitation. *Id.*

*See* ACCOUNT, 3.  
EVIDENCE, 10, 11.  
EXECUTORS AND ADMINISTRATORS, 8, 9.

### STIPULATION.

*See* PRACTICE, 1, 3.

### STOCK CERTIFICATE.

1. The delivery of a stock certificate, as collateral security for an indebtedness, with the usual power of attorney indorsed thereon, signed by the owner, in blank, transfers all the owner's title, both legal and equitable, subject only to liens or claims of the corporation; and after such delivery the holder of the certificate and power may alone cause a transfer on the books of the company. *Smith v. American Coal Co.* 317

2. A sale of the original owner's interest in the stock, made after such delivery, under an attachment issued in an action against him, passes no title to the purchaser; and the company having transferred the stock upon their books to such purchaser, without surrender of the certificate, are liable to the real owner thereof. *Id.*

3. And this is so, although the by-laws of the company provide that "no transfer of stock shall be valid unless made upon the books of the company by the person owning the stock or his attorney." *Id.*

4. But the company, having no notice of transfer of the certificate, are protected in payment of dividends to the original owner, and

in admitting him to vote on the stock, until transfer on its books. *Id.*

### STOCKHOLDER.

*See* EVIDENCE, 8 to 13.  
STOCK CERTIFICATE.  
TOWN RAILROAD COMMISSIONERS, 1 to 4.

### STOCK PLEDGE.

*See* PLEDGE, 1 to 5.

### STOCK POWER.

*See* STOCK CERTIFICATE, 1 to 5.

### STREET NUMBER.

*See* MORTGAGE, 1.

### STREETS.

*See* LEASE, 2, 3, 8, 9.

### SUBSCRIPTION.

*See* TOWN RAILROAD COMMISSIONERS, 1 to 4.

### SUBSTANTIAL RIGHT.

*See* APPEAL, 1.

### SUMMONS.

An action to recover a penalty given by statute is an action on contract, within the meaning of section 129 of the Code, and the summons should be in the form prescribed by subdivision 1 of that section. *McCabe v. N. Y. C. & Hudson R. R. Co.* 75

## SUPERVISORS.

See NEW YORK CITY AND COUNTY.

## SUPPLEMENTARY PROCEEDINGS.

1. A plaintiff's attorney received money on an *ex parte* order, in proceedings supplementary, from one owing the judgment debtor, having knowledge of a claim for the same money, and of a suit pending thereon against the person upon whom the order was made, but without disclosing these facts to the judge; the person owing had been examined and admitted the indebtedness, and the judgment debtor swore that he had owed, not that he did owe him. Judgment was recovered by the claimant, and the defendants moved against the attorney for repayment. *Held*, on appeal, that the motion was rightly granted. *Fowler v. Lowenstein*. 167
2. *Held*, also, that the suppression of the facts as mentioned was an imposition upon the justice who granted the order, and that restitution was proper on that ground, and, against an attorney, would be enforced by attachment. *Id*.
3. The attorney having stated that he had paid over the moneys to the plaintiffs in his action, he being himself one of them,—*Held*, that it was no defence. *Id*.
4. Nor was it a defence that the proceedings were taken for the benefit of plaintiff's assignee, no claim of payment to the assignee being made. *Id*.

See JURISDICTION, 1, 2, 3.

## SURETIES.

See EVIDENCE, 19.  
SHERIFF, 1 to 6.

## SURFACE WATER.

See HIGHWAYS, 1, 2.

## SURROGATE.

1. A surrogate's decision, rejecting a testamentary paper for mental incapacity, based upon the decided opinion of an attending physician whose visits were infrequent, and formed from the condition of, and not from conversations with, the deceased, against the testimony of a physician speaking not from interview, but from statement of the case, and of lay witnesses whose intercourse had been frequent, who had conversed with and seen the testatrix transact business, and who were witnesses to the paper though conflicting and colored by evident bias,—*Held*, not to be conclusive, and a feigned issue awarded on appeal. *Crotius v. Stack*. 311
2. Entire loss of intellect producing in the decedent inability to understand what he is doing or the contents of the paper when read, are necessary to warrant its rejection on the ground of incapacity. *Id*.

See EXECUTORS AND ADMINISTRATORS, 11 to 13.  
WILL, 2.

## SURROGATE'S COURT.

See PROBATE OF WILL, 1.  
SURROGATE.

## TAX.

See ACTION, 1, 2, 3.  
INJUNCTION, 1.  
LEASE, 10.

## TAX-PAYER.

See ACTION, 1, 2, 3.  
INJUNCTION, 1.  
TOWN RAILROAD COMMISSIONERS, 1 to 4.

## TENANT FOR LIFE.

See PARTITION, 4, 5.

TENANTS IN COMMON.

1. If a freshet floats the wood of different owners into a river where the property of one is mingled with and undistinguishable from that of the other, the owners become tenants in common. *Moore v. Erie Railway Co.* 39
2. And if one owner gather and take possession of the whole, he is not liable for conversion, but he holds it subject to the other's right to take his portion, and is entitled to compensation for his labor. *Id.*
3. So held where the plaintiff had piled his wood before the freshet on defendant's premises. *Id.*
4. In trover for his wood, by the plaintiff, one of the owners, against the defendant, the other owner, who had gathered and taken possession of it, evidence of demand upon the defendant's station agent, not shown to have authority to bind the defendant, and his refusal,—*Held*, inadmissible. *Id.*
5. So also is evidence that defendant used the wood, where it does not appear whether sufficient to satisfy the plaintiff's claim was left. *Id.*
6. There being no proof of conversion, and the court having charged the jury that the plaintiff, if they found for him, was entitled to interest from the time of conversion,—*Held*, that it was virtually a charge that there was evidence of conversion, and error. *Id.*

*See* CONTRACT, 4, 5.  
HUSBAND AND WIFE, 2.  
PARTITION, 7, 8.

TESTAMENTARY CAPACITY.

*See* WILL, 1, 2, 3.

THREATS.

*See* DURESS, 2, 3.  
NOTES AND BILLS, 4, 6.

TITLE DEFECTIVE.

*See* MORTGAGE FORECLOSURE, 1 to 6

TITLE TO CHATTELS.

*See* ATTACHMENT, 4, 5, 6.  
CONTRACT, 6.  
PLEDGE, 1 to 5.  
STATUTE OF FRAUDS, 7.  
STOCK CERTIFICATE, 1 to 5.  
TENANTS IN COMMON, 1, 2, 3.

TITLE TO OFFICE.

*See* ELECTION, 1 to 7.

TITLE TO REAL ESTATE.

*See* CONTRACT FOR SALE OF REAL ESTATE, 1 to 6.  
PURCHASER PENDENTE LITE.

TOWN RAILROAD BONDS.

*See* ACTION, 1, 2, 3.  
CERTIORARI, 1 to 8.  
INJUNCTION, 1.

TOWN RAILROAD COMMISSIONERS.

1. Commissioners appointed, pursuant to statute, to subscribe for stock in a railroad company, on behalf of a town, have no authority to bind the tax-payers of the town, except that which is derived from the petition presented to the county judge for leave to make such subscription, and from the statute which authorized such petition. *Rochester, N. & Pa. R. R. Co. v. Cuyler.* 481
2. A subscription to a different company than that designated by the petition or for a larger amount of stock than that authorized thereby, is void. *Id.*
3. *Held*, accordingly, that commissioners appointed to subscribe to

the stock of a certain railroad company had no power, and the court would not compel them to subscribe for stock of a company formed by the consolidation of that company with another under a different name and having different termini. *Id.*

*See* ACTION, 1, 2.  
INJUNCTION, 1.

### TOWNS.

*See* CERTIORARI, 1 to 8.  
INJUNCTION, 1.  
TOWN RAILROAD COMMISSIONERS.

### TRANSFER OF STOCK.

*See* STOCK CERTIFICATE, 1 to 5.

### TRANSITORY ACTION.

*See* NEGLIGENCE, 7

### TRESPASS.

*See* ATTACHMENT, 4, 5.  
DAMAGES, 1 to 5.  
HIGHWAYS, 1, 2.  
LEASE, 9.  
TENANTS IN COMMON, 8.

### TRADE-MARK.

1. The employment in a trade-mark of a term, applicable in common use to a particular kind of general merchandise, cannot give any exclusive right to employ it. *Wolfe v. Burke.* 151
2. Thus "schnapps," intending abroad alcoholic drink in general, and in common use here, Holland gin, may not be exclusively appropriated for trade-mark purposes. *Id.*

3. Protection to trade-marks rests upon the principle of preventing the fraudulent appropriation of a name by which only the product or manufacture of another is designated, and of shielding the public against deception by such means. (Per GILBERT, J.) *Id.*

4. The distinctive name given to a new commodity becomes, by use, its proper appellation, and passes as such into our language, and, excepting rights secured by patent, may be used in manufacturing and selling the article by any one. *Id.*

5. One cannot make a trade-mark of his name to the exclusion of a like use of it by another of the same name, the use of it by the latter being fair and unaccompanied by contrivance to deceive. *Id.*

6. Equity will restrain one claiming an exclusive right to sell under a particular trade-mark designation, which is a mere name for a kind of general merchandise, from interference, by means of injunctions, circulars and threats of prosecution made to customers, with the trade of another who uses the same designation. *Id.*

### TRIAL.

*See* LARCENY.  
PRACTICE, 4 to 8, 10, 11, 12.  
TENANTS IN COMMON, 6.

### TROVER.

*See* ACTION, 4.  
TENANTS IN COMMON, 1 to 7.

### TRUSTS AND TRUSTEES.

1. A purchaser of land from a trustee with power to convey only on the happening of an event, which is a condition precedent, must ascertain at his peril whether the condition has been fulfilled. And this is so, even although the deed

recites performance of the condition. *Grinwold v. Perry.* 98

2. It is otherwise, under a condition subsequent, under 1 R. S., 730, § 66. *Id.*

3. Accordingly, where trustees had power to sell only in case there should be a deficiency of income for certain purposes, and conveyed, reciting the condition and a deficiency under it,—*Held*, that their conveyance was void, it appearing there was in fact no such deficiency. *Id.*

4. To justify a sale the trustees should state an account and show a deficiency in point of fact. An offer to show payments of portions of the income, without going this length, is insufficient. *Id.*

5. Trustees should proceed for settlement of their accounts against the *cestuis que trust* before assuming to act on a fulfillment of the condition. *Id.*

6. An invalid trust, under the Revised Statutes, will not be upheld because it is for charitable uses. *Wetmore v. Parker.* 121

7. But a bequest to a corporation to enable it to carry out all or any of the purposes for which it is created is valid; and this is so although the duration of the trust is unlimited. *Id.*

*See* ACCOUNTING, 3, 8.  
DEVISE, 9, 10, 11, 18.  
EVIDENCE, 8 to 12.  
EXECUTORS AND ADMINISTRATORS, 1, 2, 5, 6, 7.  
RECEIVER.  
VILLAGES, 1 to 6.

#### TRUSTEES OF CORPORATION.

*See* EVIDENCE, 8 to 12.

#### ULTRA VIRES CONTRACT.

*See* CORPORATION, 5 to 10.  
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#### UNDUE INFLUENCE.

*See* WILL, 2.

#### UNITED STATES COURTS.

*See* MUNICIPAL CORPORATION, 3, 4

#### VALUABLE CONSIDERATION.

*See* JUDGMENT CREDITOR, 1.

#### VENDOR AND VENDEE OF REAL ESTATE.

*See* CONTRACT FOR SALE OF REAL ESTATE.  
EVIDENCE, 16.

#### VENDOR AND VENDEE OF CHATTELS.

*See* CONTRACT, 6.  
INSURANCE, 1, 3.  
JUDGMENT CREDITOR, 1.  
PARTNERSHIP, 1.  
PLEDGE, 1 to 5.  
STATUTE OF FRAUDS, 7.

#### VENUE.

*See* NEGLIGENCE, 7.

#### VERDICT.

*See* HUSBAND AND WIFE, 1.  
PRACTICE, 4 to 8.

#### VESTED REMAINDER.

*See* DEVISE, 1.

#### VILLAGES.

1. The trustees of the village of Lowville, incorporated under the

general act for the incorporation of villages, have no power under that act to appropriate the moneys raised for highway purposes to making or repairing sidewalks in that village. *Ellis v. Village of Lenoxville.* 484

2. A resolution passed by the inhabitants of that village, authorizing the building of a sidewalk, which specifies no sum to be raised, is of no validity, as such a resolution is expressly prohibited by the thirtieth section of the general law. *Id.*

3. *Held*, however, that the trustees being made commissioners of highways by the amendment to the charter in 1866 (chap. 224), they are bound to make repairs out of the highway fund to a sidewalk where its condition is such as to endanger the safety of travelers; and the village is liable for the omission to make such repairs to any person injured thereby. *Id.*

4. And the liability of the village is affirmatively established by proof of the charter which imposes upon the trustees the duty of raising moneys for highway purposes, as it will be presumed that they discharged their duty. *Id.*

5. The *onus* was upon defendant to show that they had no funds. *Id.*

#### VOID CONTRACT.

*See* CONTRACT, 1, 2, 3.  
CORPORATION, 7 to 12.

#### VOTE.

*See* ELECTION.  
STATUTE OF FRAUDS, 6.

#### VOTE ON STOCK.

*See* STOCK CERTIFICATE, 4.

#### WAIVER.

*See* ACTION, 4.  
CONTRACT FOR SALE OF REAL ESTATE, 1, 5.  
NOTES AND BILLS, 3, 5, 6.  
STATUTE OF FRAUDS, 5.

#### WARRANTY.

*See* INSURANCE, 6.

#### WARRANTY OF CHATTEL.

*See* EVIDENCE, 28 to 32.

#### WATER-CHANNELS.

*See* MUNICIPAL CORPORATION, 1 to 5.

#### WATER-COURSE.

*See* EASEMENT, 2, 4.  
MUNICIPAL CORPORATION, 1 to 5.

#### WAY.

1. A conveyance of land and a public-house thereon, by metes and bounds, concluded thus, "it being the intention of the party of the first part to convey twenty-one feet and four inches of the north part of said public-house, together with the use of a lane or passway, twelve feet wide, from the green, and in rear of the said public-house, to the north line of the lot above deeded, to be kept open for the purpose of passing to and from the rear of said public-house to the public common." *Held*, the premises over which the way ran being included in the grant so qualified, that it was intended to except such premises, other than the use thereof as a way, from the deed. *Rexford v. Marquis.* 249

2. *Held*, further, that the use of the way was not reserved, but excepted from the deed. *Id.*



3. And that the exception was for the benefit of the grantor and his assigns. *Id.*

4. Conveyance of the use of a way, subject to the rights of a third party to pass over it, "to be kept open as a passway," held to intend that the passway should be kept open for the benefit of the grantor and his assigns. *Id.*

5. The plaintiff's claim to a right of way being based on his user under a grant, and defendant's acquiescence and recognition of his right, *held*, that the user was evidence of the extent of the right, but not to prove its existence. *Id.*

6. The grantee of a right of way to one piece of land cannot make use of it to pass into another and adjacent piece. *Id.*

7. Thus, a right to use a way from a common to the boundary line of a particular lot will not authorize communication with an adjacent lot by means of the way. *Id.*

8. *Held*, further, that the plaintiff was only entitled to a limited right of way, and such as was reasonably necessary and convenient for the purposes of the grant, and, accordingly, a judgment below, limiting it to eleven feet in height and allowing it to be covered, affirmed. *Id.*

## WIDOW.

*See DEVISE, 12, 13.*

## WILL.

1. To enable a person to dispose of his property by will, it is not enough that he should be found to be possessed of some degree of intelligence and mind; he must, in addition, have sufficient mind to comprehend the nature and effect of the act he is performing, the

relation he holds to the various individuals who might naturally be expected to become objects of his bounty, and to be capable of making a rational selection among them. (Per MILLER, P. J.) *Forman v. Smith.* 443

2. An infirm man, aged eighty-two years, whose mind was impaired, made a will in favor of the family of a son who, for a time, had been a favorite with him, and excluded other children, provided for in prior wills. The will was contested; and the evidence, among other matters, tended to show that the son stood in confidential relations to his father, as his business adviser, and went to live with him less than a month prior to the execution of the will, exercising a controlling influence over him; that other children were excluded from the testator's presence, or not permitted to see him alone, and their conduct and language respecting him presented to him in a most unfavorable and obnoxious light. The evidence was conflicting on the essential points of exclusion, undue influence, &c., and the surrogate admitted the will. *Held*, that his decree should be reversed and a feigned issue awarded. *Id.*

3. A will and codicil were executed by a person eighty years of age; neither of the subscribing witnesses, who were the same to each instrument, testified to his mental capacity; one of them thought him not of sound mind at the execution of either paper, the first being executed in April, and second in June following. It also appeared that in the succeeding autumn the testator failed to know his children, and inquired how many he had, and could only name some of them. *Held*, that the surrogate's decision, refusing probate of the instruments, should be affirmed. *Dumond v. Kiff.* 465

## *See DEVISE.*

. EXECUTORS AND ADMINISTRATORS, 8, 9, 10.  
PROBATE OF WILL.  
SURROGATE, 1, 2.

## WITNESS.

*See* SURROGATE, 1, 2.

## WRIT OF CERTIORARI.

*See* CERTIORARI.

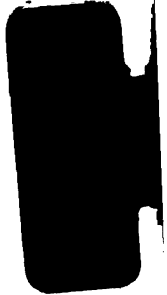
## WRITT AGREEMENT.

*See* EVIDENCE, 13 to 16.WRO<sup>d</sup> 3-DOER.*See* ACTION, 4.

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